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# The End Game of Deregulation: Myopic Risk Management and the Next Catastrophe

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# THE END GAME OF DEREGULATION: MYOPIC RISK MANAGEMENT AND THE NEXT CATASTROPHE

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## I. INTRODUCTION

On December 22, 2008, the contents of an enormous impoundment containing coal-ash slurry from the Tennessee Valley Authority's (TVA) Kingston Fossil Fuel Plant poured into the Emory River. The proximate cause of the spill was the bursting of a poorly reinforced dike holding back a pit of sludge that towered 80 feet above the river and 40 feet above an adjacent road.[1] The volume and force of the spill were so large that 1.1 billion gallons of the inky mess flowed across the river, inundating 300 acres of land in a layer four to five feet deep, uprooting trees, destroying three homes, and damaging dozens of others.[2] The catastrophic breach ruptured a gas line, caused millions of dollars in property damage, and caused incalculable environmental damage to the Emory River and its receiving water, the Clinch River.[3] A week after the spill, heaps of gray material

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1. R. WILLIAM IDE III & JOSEPH O. BLANCO, MCKENNA, LONG & ALDRIDGE LLP, A REPORT TO THE BOARD OF DIRECTORS OF THE TENNESSEE VALLEY AUTHORITY REGARDING KINGSTON FACTUAL FINDINGS 4–5 (2009).

2. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,150 (proposed June 21, 2010); Lynn L. Bergeson, *EPA Responds to Coal Ash Release*, Pollution Engineering, May 2009, at 19; Editorial, *Pool of Trouble*, WASH. POST, Jan. 12, 2009, at A12.

3. Hazardous and Solid Waste Management System, *supra* note 2, at 35,150; Richard Fausset, *Ash Spill Leaves Future Hazy*, CHI. TRIB., Jan. 1, 2009, at C14; Shaila Dewan, *Ash Flood in Tennessee Is Found to Be Larger Than Initial Estimates*, N.Y. TIMES, Dec. 27, 2008, at A10; Shaila Dewan, *Coal Ash Flood Revives Debate About Hazards*, N.Y. TIMES, Dec. 25, 2008, at A1.

remained in the river like small volcanic islands.[4] Miraculously, no one was killed.[5]

The slurry contained both fly and bottom ash, collectively known as "coal combustion residuals" (CCRs) in the euphemistic lexicon of environmental regulation.[6] Because coal-fired power plants have scrubbers that trap fumes before they are emitted into ambient air, the fly-ash portion of the spill contained significantly more than the quota of toxic heavy metals that typically result from burning coal.[7] Or, in other words, in an inevitable but ironic twist, the benefits to breathers were obtained at the expense of walkers and drinkers. TVA later estimated that the Kingston Spill had released around 2.6 million pounds of toxic pollutants into the Emory River.[8] By way of comparison, all of the other power plants in the United States released just over 2 million pounds of toxic pollutants during all of 2007.[9] Cleanup costs for the federally subsidized TVA, one of the largest electric utilities in the country, are expected to total $1.2 billion, adding $0.69 per month to the utility bills of nine million customers until 2024.[10]

The Kingston spill was the worst of its kind in U.S. history, but it was not the first, nor would it be the last. For a brief period of time, the catastrophe focused the nation's attention on the health and environmental risks posed by dumping coal ash in unlined pits in the

4. Fausset, *supra* note 3, at C14.

5. *Id*.

6. "Coal combustion residuals" consist of fly ash, bottom ash, boiler slag, and flue gas desulfurization materials that are destined for disposal. Other names given to these wastes include "coal combustion wastes" and "fossil fuel combustion wastes." *See* Hazardous and Solid Waste Management System, 75 Fed. Reg. at 35,130.

7. Notice of Availability of Preliminary 2010 Effluent Guidelines Program Plan, 74 Fed. Reg. 68,599 (Dec. 28, 2009).

8. Charlotte E. Tucker, *Kingston Spill Released 2.6 Million Pounds of Pollutants, Environmental Group Says*, 40 ENV'T REP. CUR. DEV. (BNA) 2826 (Dec. 11, 2009).

9. *Id*.

10. TVA contractors removed more that 5.4 million cubic yards of material and transported the bulk of it to a landfill in Alabama. Cleanup efforts were expected to last well into 2014, at which point the residential neighborhood would be converted to a park. Bob Fowler, *Three Years Later, Kingston Ash Spill Cleanup Continues,* KNOXNEWS.COM, http://www.knoxnews.com/news/2011/dec/19/three-years-later-kingston-ash-spill-cleanup (last updated Dec. 19, 2011). TVA also spent more that $46 million purchasing 171 damaged properties. Dylan Lovan, *Residents, Activists prod EPA for Coal Ash Rules*, CNS NEWS (April 18, 2012), http://cnsnews.com/news/article/residents-activists-prod-epa-coal-ash-rules-0 (stating that the utility has "spent $46 million in buying up some 900 acres" near the plant from about 150 owners). In addition to paying $22 million in fines to regulators, TVA agreed to commit $43 million to economic development projects in the county. Shaila Dewan, *T.V.A. to Pay $43 Million on Projects in Spill Area*, N.Y. TIMES, Sept. 15, 2009, at A13.

ground referred to as "surface impoundments."[11] Prominent national environmental groups demanded greater protection from Congress and the Environmental Protection Agency (EPA), both of which had long skittered away from confronting the problem in the face of unyielding resistance by electric utilities to any hint of regulatory intervention that would compel the safer disposal of coal ash and the reinforcement of old, poorly designed, and carelessly maintained coal-ash dumps.[12]

In the immediate aftermath of the catastrophe, Congressman Nick Rahall (D-WV) introduced a bill that would have authorized the Department of Interior to promulgate uniform federal design, engineering, and performance standards for new coal-ash impoundments.[13] Three congressional committees devoted six hearings to the need for proper regulation of coal-ash wastes.[14] Notably, EPA Administrator Lisa Jackson promised to reevaluate by the end of 2009 the agency's decades-old reluctance to regulate the disposal of some 129 million tons of coal ash generated annually,[15] a startling figure when compared to the 250 million tons of every category of household garbage that Americans generated in 2010.[16]

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11. Subpart A – Classification of Solid Waste Disposal Facilities and Practices, 40 C.F.R. § 257.2 (2001).

12. Juliet Eilperin, *Disposal of Coal Ash Rises As Environmental Issue*, WASH. POST, Jan. 16, 2009, at A4.

13. *See id.*; Charlotte E. Tucker, *Bill Would Require Coal Combustion Waste Regulation Under Surface Mining Control Act*, 40 ENV'T REP. CUR. DEV. (BNA) 171 (Jan. 23, 2009).

14. *TVA's Kingston Ash Slide: Evaluation of Potential Causes and Updates on Cleanup Efforts*: *Hearing Before the Subcomm. on Water Res.s and the Env't of the H. Comm. on Transp. and Infrastructure*, 111th Cong., 1st Sess. (2009) [hereinafter *Ash Spill Causes Hearing*]; *Coal Combustion Byproducts: Potential Impact of a Hazardous Waste Designation on Small Businesses in the Recycling Industry*: *Hearing Before the Subcomm. on Rural Dev., Entrepreneurship and Trade of the H. Small Bus. Comm.*, 111th Cong., 2d Sess. (2010); *Coal Combustion Waste Storage and Water Quality: Hearings Before the Subcomm. on Water Res. and the Env't of the House Comm. on Transp. and Infrastructure*, 111th Cong., 1st Sess. (2009); *The Tennessee Valley Authority's Kingston Ash Slide: Potential Water Quality Impacts of Coal Combustion Waste Storage*: *Hearings Before the House Comm. on Transp. and Infrastructure*, 111th Cong., 1st Sess. (2009); *Hearings before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.*, 111th Cong., 1st Sess. (2009); *Oversight Hearing on the Tennessee Valley Authority and the Recent Major Coal Ash Spill*: *Before the S. Comm. on Env't and Public Works*, 111th Cong., 1st Sess. (2009).

15. Shaila Dewan, *Administration Plans New Regulations On Coal-Ash Ponds by End of the Year*, N.Y. TIMES, March 8, 2009, at A20; Eilperin, *supra* note 12, at A4.

16. U.S. EPA, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2010 (2011).

Jackson met this deadline.[17] But her efforts were thwarted when an intensive industry lobbying campaign provoked the White House to rewrite the EPA proposal, adding two significantly weaker options and derailing the momentum of Jackson's proposal.[18] The 111th Congress failed to enact protective legislation and, in the aftermath of the 2010 mid-term election that transferred control of the House of Representatives back to the Republican Party, the 112th Congress nearly enacted legislation that would have divested the EPA of its authority to adopt strong coal-ash rules.[19] Four years after Kingston, the federal government has yet to take action despite another large spill into Lake Michigan.[20] To the extent that such disposal is regulated at all, it is subject only to erratic and often ineffective state regulatory controls.[21]

In the past, catastrophic events like the Kingston disaster have resulted in dramatic governmental reforms, pushing the law forward to meet new challenges and provide expanded protection for public health and the environment. Congress enacted most of the regulatory statutes of the Progressive Era, the New Deal, and the Public Interest Era[22] after widely publicized tragedies or abuses stirred public opinion to levels sufficient to overcome the inertia that otherwise overwhelms

17. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,153 (proposed June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271, 302).

18. James Goodwin, *The Delays Get Delayier: The Sad First Year of EPA's Coal Ash Proposal*, CPR BLOG (May 4, 2011), http://www.progressivereform.org/CPRBlog.cfm?idBlog=BB2B286A-9713-BCF4-C74CD4C1151572A8. For an explanation of the two new options, *see infra* note 198 and accompanying text.

19. H.R. 2273, 112th Cong. (2011).

20. Michael Bologna, *Sierra Club Plans Lawsuit Against Utility Over Coal Ash Incident Near Milwaukee*, 42 ENV'T REP. CUR. DEV. (BNA) 2578, (2011); Nora Macaluso, *Power Plant Bluff Collapse Dumps Coal Ash into Lake Michigan; Cleanup Under Way*, 42 ENV'T REP. CUR. DEV. (BNA) 2473 (2011).

21. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,133 (stating that 67% of utilities do not have liner requirements for CCR surface impoundments), 35,152 ("[O]f the 36 states that have CCR surface impoundments, 25 have permit programs. Permitting is particularly important to provide oversight and to approve implementation plans such as the placement of groundwater monitoring wells. Without a state permit program, regulatory flexibility is limited, and certification by an independent registered professional engineer is necessary.").

22. Here, the "Public Interest Era" refers to the period of active government extending roughly from the mid-1960s through the mid-1970s.

Congress and the regulatory agencies.[23] For example, the Nuclear Regulatory Commission reacted to the Three Mile Island near-meltdown in 1979 by putting into place much stricter regulatory requirements for power plants.[24] The Federal Aviation Administration has developed a set of new airline safety requirements following nearly every major passenger airplane crash.[25] The EPA asked for and received authority from Congress to regulate fugitive releases from chemical plants following the December 1984 explosion at the Union Carbide pesticide plant in Bhopal, India that killed 2,000 people.[26]

But in the context of more recent history, the passive response to the Kingston spill was not an outlier. The past decade has witnessed a confluence of crises across a broad array of federal regulatory programs. The response by Congress and the regulatory agencies to most of these multiple crises has been tepid at best. The Deepwater Horizon explosion and oil spill of April 2010 generated no new legislation, and the regulatory response amounted only to a modest reorganization and renaming of the agency that had utterly failed—and is still failing—to regulate deepwater oil and gas drilling.[27] The Upper Big Branch (UBB) mine disaster in the same month likewise generated no new legislation and no significant regulatory reforms.[28] Even when crises did stimulate Congress to act, the changes were by no means dramatic. The Consumer Product Safety Improvement Act (CPSIA) of 2008 did little to enhance the Consumer Product Safety

23. THOMAS O. MCGARITY, FREEDOM TO HARM (forthcoming 2013); Richard J. Lazarus, *Climate Change Law In and Over Time*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 29, 33–34 (2010); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 217–18 (2012).

24. Christian Perenti, *After Three Mile Island: The Rise and Fall of Nuclear Safety Culture*, THE NATION (Mar. 22, 2012), *available at* http://www.thenation.com/article/159386/after-three-mile-island-rise-and-fall-nuclear-safety-culture#.

25. MCGARITY, *supra* note 23.

26. *Bhopal (Chemical Leak)*, N.Y. TIMES (Jan. 11, 2011), http://topics.nytimes.com/top/news/international/countriesandterritories/india/bhopal/index.html; Envtl. Prot. Agency, Clean Air Act Section 112(r): Accidental Release Prevention/Risk Management Plan Rule (2009), *available at* http://www.epa.gov/oem/docs/chem/caa112_rmp_factsheet.pdf.

27. Pam R. Russell, *Oil Spill Legislation Shows Signs of Clip-Sliding Away*, CONG. QUARTERLY, Apr. 23, 2012, at 798; Robin Bravender & Katie Howell, *Fallout Begins After Senate's Failure to Act on Energy, Oil Spill*, N.Y. TIMES, Aug. 5, 2010, *available at* http://www.nytimes.com/gwire/2010/08/05/05greenwire-fallout-begins-after-senates-failure-to-act-on-54000.html.

28. Kim Geiger et al., *Miners' Survivors Feel Let Down: A Year After a Blast Killed 29, a Safety Bill has Failed and Efforts to Boost Enforcement are Mired in Appeals*, L.A. TIMES, May 8, 2011, at A18.

Commission's (CPSC) capacity to reduce the risks posed by imported products, and Congress soon amended the statute to provide broad exemptions from its lead-poisoning prevention requirements for existing toys.[29] The Food Safety Modernization Act of 2010 left much of the responsibility for protecting the public from contaminated food in the hands of food producers subject to oversight by a resource-starved FDA, and it did nothing at all to cure the overlapping jurisdiction, misplaced priorities, and weak enforcement that have plagued food-safety regulation since the early twentieth century.[30]

This recent history raises the question of why the twentieth-century dynamic of crisis and reform has apparently disappeared in the early twenty-first century. Using the Kingston catastrophe as a case study, this article offers several explanations for this unfortunate trend. We argue that regulated industries dominate regulatory debates on Capitol Hill and at the federal agencies to an unprecedented extent. Rather than stressing the importance of science-based rulemaking, the White House has engaged in its own intemperate interventions, upping the ante for flexing raw political muscle at both ends of Pennsylvania Avenue. The growing weakness of the media's investigative reporting has exacerbated both trends.[31] In the end, these factors have sparked the deeply disturbing evolution of the administrative process into a kind of "blood sport."[32] This degeneration's most obvious and immediate threat is to our shared "commons,"[33] but over the long run it is equally likely to cause irrevocable harm to individual businesses and to the efficient functioning of regulated markets.

Part II examines what we know about the Kingston spill and the implications of that information for a recurrence of such events. Part III explains how the EPA and Congress responded to this disaster,

29. MCGARITY, *supra* note 23; Steinzor, *supra* note 23, at 218–19.

30. MCGARITY, *supra* note 23; Steinzor, *supra* note 23, at 218–19.

31. *See*, *e.g.*, Jodi Enda, *Capital Flight*, AM. J. REV. Summer 2010, at 15 (finding watchdog reporting is at an alarming low at many federal agencies and departments whose actions have a huge impact on the lives of American citizens).

32. *See* Thomas O. McGarity, *Administrative Law as Blood Sport, Policy Erosion in a Highly Partisan Age,* 61 DUKE L.J. 1671, 1671 (2012) (noting "that in this era of deep division over the proper role of government in society, highstakes rulemaking has become a 'blood sport' in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies").

33. *See* Garrett Hardin, *The Tragedy of Commons*, 162 SCI. 1243, 1244 (1968) (noting that tragedy can ensue when each actor tries to maximize his or her gain at the expense of the common good when resources are shared).

highlighting how politics driven by a deregulatory ideology eventually swamped the EPA's deliberative, science-based rulemaking process. Part IV offers some suggestions for rebuilding regulatory agencies like the EPA and for restoring public trust in government as first steps on the way to a regulatory regime that is capable of preventing future Kingston tragedies.

## II. THE KINGSTON SPILL

### *A. An Engineering Fiasco*

For more than half a century, TVA power plant near Kingston dumped its coal ash in a huge, 100-acre impoundment.[34] Like many other coal-ash surface impoundments, the Kingston facility was built out of the material that it held—compacted coal ash and earth.[35] Since the dikes that formed the walls of the facility had to stay dry to retain their strength, the slurry dumped into the pit had to be wet enough to keep the ash from becoming wind-borne, but not so wet that it would weaken the dikes.[36] This impossibly delicate balance was born of expediency, not sound engineering.

In the immediate aftermath of the spill, TVA CEO Tom Kilgore blamed the spill on heavy rain and freezing temperatures just prior to the breach.[37] Anticipating litigation, TVA's general counsel hired AECOM, a geotechnical-engineering consulting company with expertise in forensic analysis, to conduct a study of the "root causes" of the spill.[38] The firm concluded that the spill was caused by a combination of four conditions—a layer of unstable "slime" composed of ash and silt eighty feet below the surface of the impoundment, the high water content of the sluiced ash, the increasing height of the ash, and the construction of sloping dikes over the wet ash.[39] The study concluded that although the impoundment was "on the verge of failure," TVA employees had

34. Bergeson, *supra* note 2, at 19.

35. IDE III ET AL., *supra* note 1, at 7.

36. Ed Marcum, *TVA Trial Raises Questions of Culture*, KNOXVILLEBIZ.COM (Nov. 6, 2011), http://www.knoxnews.com/news/2011/nov/06/tva-trial-raises-questions-of-culture/.

37. John Broder, *Plant That Spilled Coal Ash Had Earlier Leak Problems,* N.Y. TIMES, Jan. 9, 2009, at A11.

38. *Ash Spill Causes Hearing*, *supra* note 14 (testimony of Tom Kilgore, CEO, TVA).

39. *Id.*; AECOM, ROOT CAUSE ANALYSIS OF TVA KINGSTON DREDGE POND FAILURE ON DECEMBER 22, 2008, 81 (2009); Bill Poovey, *TVA Attorney Says No Proof Negligence Caused Spill*, KNOXVILLEBIZ.COM (Oct. 12, 2011), http://www.knoxnews.com/news/2011/oct/12/tva-coal-ash-trial-at-closing-arguments/.

observed "no visible signs of distress . . . that would have indicated that a deep-seated failure was about to occur."[40]

Critiques soon emerged challenging the credibility of AECOM's findings. Earthjustice charged that the consultant had failed to examine whether the company's negligence played any role in the collapse.[41] TVA's Inspector General (TVA IG) later said that one reason for commissioning the AECOM study was to lessen legal liability.[42] The consultant was told specifically "not to judge TVA employees and contractors" in determining the spill's cause.[43] According to the senior manager of TVA's Coal Combustion Byproducts group, TVA wanted AECOM to point the finger at circumstances that the company could not control.[44] The TVA IG concluded: "[l]itigation strategy seems to have prevailed over transparency and accountability" to the point that the AECOM study put too much weight on the "slime" theory and insufficiently emphasized the TVA's institutional failures.[45] An engineering consultant hired by the TVA IG concluded that "AECOM's emphasis on the "slime layer . . . inappropriately diminishe[d] the role that the design and operation of the Kingston ash pond played in the spill."[46]

A technical advisory panel assembled by the Governor of Tennessee to investigate the Kingston catastrophe agreed with AECOM that "the weak foundation interface layer likely did contribute to the failure that occurred," but added that "the stability

40. AECOM, *supra* note 39, at 81. At the trial of the landowners' lawsuit against TVA, the engineer who headed up the AECOM study emphasized the report's conclusion that the spill was caused by a "slime layer" of ash that gave way much like yogurt becomes more fluid when it is stirred. Poovey, *supra* note 39.

41. Charlotte E. Tucker, *TVA Cites Multiple Causes for Spill; Environmental Group Criticizes Agency*, 40 ENV'T REP. CUR. DEV. (BNA) 1561 (July 3, 2009).

42. *See* OFFICE OF THE INSPECTOR GENERAL, TENNESSEE VALLEY AUTHORITY, REVIEW OF THE KINGSTON FOSSIL PLANT ASH SPILL ROOT CAUSE STUDY AND OBSERVATIONS ABOUT ASH MANAGEMENT i (2009) [hereinafter REVIEW OF ASH SPILL CAUSES].

43. Bill Poovey, *TVA Watchdog Inspector Testifies at Spill Trial*, KNOXVILLEBIZ.COM (Oct. 11, 2011), *available at* http://www.knoxnews.com/news/2011/oct/11/trial-on-tva-ash-spill-lawsuits-starting-4th/.

44. Bill Poovey, *TVA Manager Testifies for Ash Spill Plaintiffs*, KNOXVILLEBIZ.COM (Oct. 5, 2011), *available at* http://www.knoxnews.com/news/2011/oct/05/plaintiff-expert-in-ash-spill-trial-blames-tva/.

45. REVIEW OF ASH SPILL CAUSES, *supra* note 42, at 4; Poovey, *supra* note 39.

46. REVIEW OF ASH SPILL CAUSES, *supra* note 42, at 18 (noting that the TVA senior manager testified that she viewed the "slime" theory as a "little bit bogus."); Poovey, *supra* note 44.

of the Kingston dredge cells" was at a "critical state of failure regardless of the presence of the emphasized layer of weak foundation material."[47] The panel further concluded that a "critical deficiency" at the facility was "an apparent lack of understanding or consideration of the evolutionary process of the construction at the TVA Kingston plant."[48] In addition, TVA lacked an "on-going, consistent method of design evaluation, documentation and communication to manage the evolutionary process."[49] "[T]he types of materials used in the construction of the Kingston dredge cell were assumed to perform similarly to conventional soil materials," but the sluiced fly-ash materials did not in fact "behave in a manner consistent with conventional clay and silt embankment construction."[50]

> The lack of engineering design for the raising of the cells, the inadequately understood material properties, pore pressure dissipation properties and material consolidation mechanisms of the ash, the methods of placement of the ash, the staged upstream construction, and the dredging activities all contributed to the condition of the pre-failure structure.[51]

In short, from an engineering perspective, the impoundment was a disaster waiting to happen, and it was attributable to both technical and institutional failures.

### *B. Institutional Culture*

Severe management problems also undermined TVA's ability to recognize that the Kingston coal-ash pond was unstable. As the impoundments evolved over the years, the organizational entities within TVA responsible for the safety of the dikes changed, and the employees responsible for modifying the impoundments no longer adhered to the original design theories for the facility.[52] Among other things, the original design called for earthen dikes, not dikes made partially out of coal ash.[53] An expert engineer for adjacent landowners

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47. TDEC ADVISORY BOARD, LESSONS LEARNED FROM THE TVA KINGSTON DREDGE CELL CONTAINMENT FACILITY FAILURE 14 (2009) [hereinafter TDEC LESSONS LEARNED].

48. *Id.* at 5.

49. *Id*.

50. *Id.* at 6.

51. *Id.* at 14–15.

52. IDE III ET AL., *supra* note 1, at 13, 16–17.

53. Ed Marcum, *Expert Says TVA Coal Ash Dike Not Built as Planned*, KNOXNEWS.COM (Sept. 28, 2011), http://www.knoxnews.com/news/2011/sep/28/expert-says-tva-coal-ash-dike-not-built-as/.

in subsequent litigation concluded that the departure from the original plans resulted in a dike that was significantly less stable than the original design.[54] He testified that when TVA wanted to raise the level of the dike in 1975, a consultant's study revealed that the foundation of the original dike failed to conform to the original design and that the dike therefore became weaker as its height increased.[55]

In a comprehensive report to Congress, the TVA IG found that, for more than a decade prior to the spill, managers had received multiple warnings from employees and consultants raising "red flags" about the safety of the retention pond, but "for reasons that are still not entirely clear," they had failed to make "appropriate safety modifications" to address the problems.[56] In April 1985, a TVA engineer wrote a memorandum to upper-level officials raising his concerns about the stability of Dike C. The memorandum stated that the actual construction of Dike C did not conform to the design drawings for the dike and that preventive measures used in building Dike C were insufficient. The memorandum therefore recommended that management assign someone to inspect Dike C on a daily basis to look for signs of instability.[57] The TVA IG's consulting engineer agreed that the "safety factor" employed in building the dike was "less than the minimum acceptable value of 1.5" and that TVA's construction of additional capacity, raising elevations above the original containment dike system, may have further decreased the margin of safety. [58]

Another memorandum, written in 1987, from the TVA's Director of Environmental Quality to the TVA Manager of Policy, Planning, and Budget stated that, "expansions of ash ponds" had resulted in dikes containing the wet ash becoming "quite high with increasing risk and consequences of a breech."[59] To address "the potential for harm to both surface and groundwater from the failure of a dike," the memorandum recommended that the "establishment of more specific inspection standards for these dikes should be examined."[60] The memorandum triggered a discussion among some

54. *See id.* (stating that the subsoils became weaker as the depth increased).
55. *Id.*
56. REVIEW OF ASH SPILL CAUSES, *supra* note 42, at 18.
57. *Id.* at 19.
58. *Id.*
59. *Id.* at 6.
60. *Id.*

TVA officials about "whether the ash ponds should have been managed under TVA's Dam Safety Program, which would have required substantially more rigorous inspections and engineering."[61] Those involved decided not to change these procedures.[62]

Responding to a small, localized leak at the Kingston retention pond in 2003, TVA hired a consulting engineer to conduct a slope-stability analysis of the pond. The engineer observed "a 7- to 10-foot thick layer of loose ash immediately overlaying the clay soil beneath the ash pond" that could undergo "liquefaction" under some conditions, including a seismic event.[63] Although the probability of such an event was "extremely low," the consultant noted that the existing methods for predicting liquefaction were "insufficient" and recommended that TVA improve the drainage in the pond.[64] Instead of implementing the recommendation, TVA hired a second contractor, Geosyntec, to undertake a peer review of the disposal plans for the facility and of the prior consultant's memorandum.[65] Geosyntec concluded that the "potential for liquefaction should be estimated and, depending on the results of this estimate, a liquefaction analysis may be required."[66] If the analysis concluded that the site was likely to liquefy, then "ground improvement techniques need to be implemented."[67] Upper-level management failed to respond to this report.[68] A consulting engineer hired by the TVA IG concluded that the Geosyntec report indicated "the expansion design should have been modified to conform to a more stringent design configuration."[69] Another expert, hired by the plaintiffs in the landowner litigation, testified that the Geosyntec report was "virtually saying that the site slopes are not safe for supporting people or construction equipment."[70]

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61. *Id*.
62. *Id*.
63. *Id.* at 19.
64. *Id.* at 19–20.
65. *Id.* at 20.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*.
70. Ed Marcum, *Expert Witness Says TVA Failed to Act on 2003 Dike Failure*, KNOXNEWS.COM (Sept. 29, 2011), http://www.knoxnews.com/news/2011/sep/29/expert-witness-says-tva-failed-to-act-on-2003/.

In the end, the TVA IG identified "systemic problems that ha[d] their genesis in the culture" of the organization.[71] Senior managers "relegated ash to the status of garbage at a landfill rather than treating it as a potential hazard to the public and the environment."[72] A TVA-sponsored review by the law firm McKenna, Long & Aldridge identified "culture failures" that allowed unsafe "conditions to occur and remain undetected or unaddressed."[73] The McKenna, Long & Aldridge report described a "siloed" decision-making structure under which "[n]o fewer than four separate TVA divisions had responsibilities related to the huge utility's coal ash facilities. Although the various responsibilities necessarily overlapped and were interdependent, communication between the groups was strained and in some instances, non-existent."[74] The senior manager in charge of handling coal ash at the facility testified that when leaks were discovered in the dikes, the engineering department was responsible for identifying the problem and proposing a solution, her department was responsible for budgeting resources to carry out the repair, and the heavy equipment division was responsible for implementing the fix.[75] With so many groups involved in managing the retention ponds, a "lack of accountability" prevailed—orders were considered recommendations and engineers responsible for annual inspections made the same recommendations year after year.[76] TVA's CEO admitted that "[w]ith little sharing of information internally and no clear accountability, a culture was created in which the management, storage and disposal of coal ash and other combustion products were not seen as significant as other aspects of TVA's operations."[77] He agreed that TVA required a change in the "overall culture" of the organization "to improve the rigor and discipline with which we approach every aspect of our work."[78]

Other institutional, managerial, and cultural deficiencies compounded these fundamental communication problems and pervasive lack of accountability: TVA did not provide adequate

71. REVIEW OF ASH SPILL CAUSES, *supra* note 42, at 30.

72. *Ash Spill Causes Hearing*, *supra* note 14, at 122 (statement of Richard Moore, Inspector General, TVA).

73. IDE III ET AL., *supra* note 1, at 2.

74. *Id.* at 19.

75. Marcum, *supra* note 36.

76. IDE III ET AL., *supra* note 1, at 2–3.

77. *Ash Spill Causes Hearing*, *supra* note 14, at 164 (testimony of Tom Kilgore, CEO, TVA).

78. *Id.* at 163–65; IDE III ET AL., *supra* note 1, at 3.

training and education to those responsible for building and maintaining the CCR impoundments;[79] it did not provide written standard operating procedures for constructing, operating, and maintaining the retention ponds;[80] it did not pay sufficient attention to quality assurance and quality control with respect to ash disposal;[81] it devoted inadequate resources to maintaining the coal-ash impoundments;[82] it reacted to seeps (leaks) and other safety-related problems with inexpensive "fixes" rather than addressing the underlying causes;[83] and its upper-level management resisted taking safety-related advice from knowledgeable employees.[84] The TVA IG concluded that "TVA was on notice about safety issues" and that "those safety issues were not addressed by TVA."[85] Its consulting engineer went a step further, concluding that TVA "could have possibly prevented the Kingston Spill" if it had implemented the modifications recommended in the 2004 Geosyntec report.[86]

In the aftermath of the spill, TVA promised fundamental changes,[87] but its public actions give little reason for confidence that its institutional culture will change anytime soon. Despite the multiple findings of independent investigators, TVA has relentlessly refused to recognize the full panoply of internal problems that caused the spill. Instead, it has steadfastly maintained that the dike failure was caused by building the pit over a "slime" layer of loose ash and silt eighty feet below the surface of the impoundment, a mistake that was made decades ago.[88] This emphasis on the slime theory allows TVA to claim that current managers were not negligent,[89] and supports self-serving claims by the electric utility industry that the Kingston spill "was a

79. IDE III ET AL., *supra* note 1, at 3; *Ash Spill Causes Hearing*, *supra* note 14, at 164 (testimony of Tom Kilgore, CEO, TVA).

80. IDE III ET AL., *supra* note 1, at 3

81. *See id.* at 3–4 (noting that TVA lacked a robust Quality Assurance/Quality Control plan, which created an environment where employees felt empowered to ignore engineers); Marcum, *supra* note 36.

82. IDE III ET AL., *supra* note 1, at 3–4.

83. *Id.* at 4.

84. Ed Marcum, *TVA Manager: Superior Ordered Deletions to Report*, KNOXNEWS.COM (Oct. 5, 2011), http://www.knoxnews.com/news/2011/oct/05/tva-manager-superior-ordered-deletions-to-report/ (quoting Melissa Hedgecoth).

85. REVIEW OF ASH SPILL CAUSES, *supra* note 42, at 21.

86. *Id*.

87. *Id.* at 37–39; *Ash Spill Causes Hearing*, *supra* note 14 (testimony of Kilgore, CEO, TVA); Marcum, *supra* note 36.

88. Poovey, *supra* note 39.

89. *See* REVIEW OF ASH SPILL CAUSES, *supra* note 42, at 18.

'one-off' event caused by a condition not believed to be present anywhere else in the world."[90] TVA's active participation in the campaign to stifle the EPA's efforts to regulate coal-ash disposal is additional discouraging evidence that its institutional culture has not changed sufficiently to provide adequate assurance that similar fiascos will not occur in the future.[91]

Of course, this pattern of resistance by senior management to repeated warnings of pending disaster is not unique to TVA. Investigations of other recent disasters reveal similarly troubling, equally lengthy trails of internal recriminations regarding conditions that were at least as dangerous and that led, just as inevitably, to catastrophes. The most notorious example is BP (formerly British Petroleum), which had a long and disgraceful history of fatal accidents and environmentally damaging leaks at its American installations, from corroded and leaking oil pipelines on Alaska's North Slope to the massive explosion at a Texas City refinery that killed eleven people.[92] The huge corporation was run by executives in London who were focused with obsessive tunnel vision on reducing operating and maintenance costs.[93] For example, in the wake of the Texas City explosion, BP hired former Secretary of State James A. Baker III to head up an investigative taskforce to uncover the root causes of the tragedy.[94] The Baker commission's 2007 report did not equivocate, attributing the accident to a corporate culture that allowed crucial components of the physical plant to "run to failure" and that penalized workers for expressing safety concerns.[95]

In a similar vein, Massey Energy, the company that owned and operated the Upper Big Branch mine (UBB) when a methane gas explosion killed 29 miners, operated at the margins of the law, amassing literally thousands of violations in the years prior to the explosion and tying regulators in knots with appeals. Massey has

90. *Id*.

91. Steinzor, *supra* note 23, at 264–65.

92. For a description of these events, *see* Rena Steinzor & Anne Havemann, *Too Big to Obey: Why BP Should Be Debarred*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 81, 97–105 (2011).

93. *Id.*

94. BAKER SAFETY REVIEW PANEL, THE REPORT OF THE B.P. U.S. REFINERIES INDEPENDENT SAFETY REVIEW PANEL (2007), *available at* http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/SP/STAGING/local_assets/assets/pdfs/Baker_panel_report.pdf.

95. *Id.*

received 3,007 MSHA safety citations since 1995 at the UBB.[96] But the company routinely contested these citations, avoiding correcting the violations and paying the penalties for months and even years in many instances. In 2009 alone, the company contested 34.7% of the 516 safety violations it received.[97] Massey also contested another $251,613 in MSHA fines for violating the UBB's ventilation plan, a critical factor in the explosion.[98] During the years leading up to the accident, Massey was assessed over $2.2 million in fines at the UBB and had contested about half of that amount.[99] The sheer number of violations strongly suggests that Massey executives knew of the dangerous work environment at the mine.

Because these and other fiascos have occurred in succession over the course of the last decade, inquiries into the adequacy of the responsible entity's institutional culture with respect to known hazards have become *de rigueur* in the wake of catastrophes. Yet the conclusion to which these investigations invariably lead—that complex industrial operations engaged in high-risk operations have great difficulty avoiding the devastating consequences of failure—almost never translates into the epiphany that government must step in both to punish past transgressions and to change the underlying culture. Instead, that obvious implication is shoved off the table or, in cases when the catastrophe is so damaging that it cannot easily be ignored, the individual perpetrator is written off as a "rogue" actor whose malfeasance is atypical of the industry.

For example, the United Mine Workers of America (UMWA) effectively labeled Massey as a reckless outlier when it accused the company of "industrial homicide" a year and a half after the UBB explosion.[100] Coal companies also tried to distance themselves from the explosion by claiming that Massey was an outlier.[101] The industry argued that while fifty-four workers were killed in Massey mines from 2000 through 2010, the nation's largest coal company, Peabody

96. Brad Johnson, *Deadly Record: Massey's Mine in Montcoal has been Cited for Over 3,000 Violations, Over $2.2 Million in Fines*, THINKPROGRESS.ORG (Apr. 6, 2010), http://thinkprogress.org/economy/2010/04/06/90370/massey-deadly-mine/?mobile=nc.

97. *Id*.

98. *Id.*

99. *See id*. (stating that Massey has contested $1,128,833 in fines at UBB).

100. Ken Ward, Jr., *UMW Calls Massey Disaster "Industrial Homicide,"* CHARLESTON GAZETTE (Oct. 25, 2011), http://www.wvgazette.com/News/201110250214.

101. J. DAVITT MCATEER AND ASSOCIATES, UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE IN BASIC COAL MINE SAFETY PRACTICE 93 (2011), *available at* www.nttc.edu/ubb.

Energy, had only six fatalities during that period.[102] This characterization gave solace to the survivors and deniability to the industry by making Massey the wholly culpable entity, but it ignored the fact that the rest of the mining industry also games the enforcement system in similar ways, thereby obscuring disasters-in-the-making. For example, according to the House of Representatives Committee on Education and Labor, mine operators abuse the appeals process to delay compliance and boost revenues.[103] The committee found that "blanket and indiscriminate" challenges have resulted in a backlog of 16,000 cases involving over $195 million in fines, allowing "irresponsible mine operators to avoid stiffer penalties."[104]

### *C. Regulatory Dysfunction*

In the absence of any credible industry-wide commitment to take the lessons of the Kingston spill to heart, our focus must shift to what government was doing to address the problem. Because the EPA does not regulate coal-ash surface impoundments, states provide the only oversight. The EPA's evaluation of their performance reveals critical failures in key states.[105] And the track record of state supervision at the Kingston TVA impoundment confirms this analysis.

The Tennessee Department of Environmental Conservation (TDEC) had administered a permit program for surface impoundments at power plants since the 1980s, but the Kingston impoundment, which began receiving waste in the 1950s, was effectively grandfathered into the system. TVA did not file its first permit application for the dump site until the mid-1990s, and the TDEC did not issue a permit until 2000, after the impoundment walls were already nearly 60 feet high.[106] TDEC then allowed TVA to raise

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102. *Id.*

103. *See generally Reducing the Growing Backlog of Contested Mine Safety Cases: Hearing Before the Comm. On Educ. And Labor*, 111th Cong. (Feb. 23, 2010) (testimony of George Miller, Chairman), *available at* www.gpo.gov/fdsys/pkg/CHRG-111hhrg54828/html/CHRG-111hhrg54828.htm.

104. *Id.* at 2.

105. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,150 (proposed June 21, 2010) (alluding to "a growing record of proven damage cases to groundwater and surface water, as well as a large number of potential damage cases" in many states).

106. IDE III ET AL., *supra* note 1, at 4.

the walls another 20 feet, bringing its total height to 80 feet above the Emory River and 40 feet above an adjacent road.[107]

TDEC conducted quarterly inspections at the Kingston impoundment. The inspections were limited to visual inspections that lasted about an hour. The inspector filled out a one-page inspection report consisting of a checklist and a small space for the inspector's comments.[108] The vast majority of the reports from 2002 through May 2008 reported "no violations," and those that did identify problems noted that TVA was adequately addressing them.[109] The problems that TVA's consultants identified in 2004 were also identifiable by TDEC inspectors during their quarterly inspections, but they consistently gave the ash-retention pond high marks for reasons that remain a mystery.[110]

The history of the retention pond and the multiple post-spill investigations give no indication that state regulators had any impact whatsoever on how the facility was constructed, expanded, maintained, or operated. After the disaster, the governor's advisory board recommended that TDEC promulgate more stringent regulations for such facilities.[111] It urged TDEC to "focus on the need for guidelines or regulations that will improve life-cycle design requirements and related operational procedures for coal combustion waste [facilities]" and "require effective management oversight and thorough engineering design philosophy."[112] It recommended that the Tennessee legislature amend the Tennessee Safe Dams Act of 1973 to eliminate exemptions for wastewater-impoundment barriers. It also recommended that the legislature ensure that all dams with high or significant hazard were adequately regulated with respect to safety and stability.[113] Although the advisory board did not specifically find that the TDEC program was inadequate, the extensive recommendations for improvement strongly suggest that it was not impressed with the existing arrangements. Ultimately, the Tennessee legislature enacted legislation prohibiting the state environmental

107. *Id.* at 4–5.

108. *Id.* at 12; *see* DIV. OF SOLID WASTE MGMT., TENN. DEP'T OF ENV'T AND CONSERVATION, SOLID WASTE DISPOSAL FACILITY EVALUATIONS (2008), *available at* http://web.knoxnews.com/pdf/123108tdec-inspection02-08.pdf.

109. *See* DIV. OF SOLID WASTE MGMT., *supra* note 108.

110. Marcum, *supra* note 70.

111. TDEC LESSONS LEARNED, *supra* note 47.

112. *Id.* at 6. In particular, it recommended that TDEC ban the "upstream staged construction" design that TVA used at the Kingston facility. *Id*. at 1–2.

113. *Id.* at 17.

agency from issuing solid waste disposal permits for new or lateral expansions of existing coal-ash-disposal facilities if they did not provide for liners, proper closure, and caps.[114] Unfortunately, this approach did nothing to resolve the national problem of decrepit coal-ash surface impoundments; it may even have had the effect of driving the disposal of Tennessee utilities' wastes to other states.

*D. Kingston as Precedent*

In the wake of the Kingston spill, with EPA Administrator Lisa Jackson's reconsideration of the EPA's non-regulatory approach making the prospect of strong federal intervention seem possible for the first time, the electric-utility industry was at pains to distinguish the Kingston spill from any situation that might conceivably be addressed by new rules. "The solution isn't simply to impose the most burdensome regulation on utilities whose customers would bear the brunt of the cost. In fact, regulating coal ash as hazardous would not have prevented the December 2008 spill at the nearby Kingston facility," Dan Riedinger of Edison Electric Institute (EEI), the industry's primary trade group, told EPA officials at a public hearing in Knoxville.[115] "No one can downplay the tragedy of the Kingston impoundment failure," agreed fellow witness Tom Schmaltz, environmental director of Headwaters Inc., which manufactures heavy construction materials, "but the Kingston impoundment failure and other cases cited are engineering failures. We must distinguish between engineering failures and the nature of a waste."[116]

Taken together, the two statements mask subtle contradictions. If, as Schmaltz suggested, the only requirement at stake was an EPA decision to attach a negative terminology to coal ash, he was right that TVA could have kept dumping slurry at Kingston with impunity and would certainly have ended up at the same place—with a disastrous and expensive spill on its hands that had not been prevented by the federal rules. On the other hand, why, as Riedinger suggested, would such "regulations" prove so "burdensome," motivating such vociferous opposition, if all that was at stake was a label?

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114. Andrew M. Ballard, *Legislature Approves Restrictions on Coal Mining, Coal Ash Disposal*, 40 ENV'T REP. CUR. DEV. (BNA) 1146 (May 15, 2009).

115. *EPA Hears Passionate Pleas on Both Sides of Coal Ash Regulation Issue*, WBIR.COM (Oct. 27, 2010, 7:05 PM), http://www.wbir.com/rss/article/139934/2/EPA-hears-passionate-pleas-on-both-sides-of-coal-ash-regulation-issue.

116. *Id*.

In fact, the EPA's original proposal, ultimately published as the strongest of three "options" in the rulemaking notice that emerged from a lengthy White House review process, would have required that all coal-ash disposal sites meet stringent construction and siting requirements[117] that might well have prevented the Kingston spill had they been in effect when the dump was first opened several decades ago. As important, the stringent approach of treating coal ash as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA) would have given the EPA authority to require "corrective action" at old, unstable surface impoundments so long as those locations continued to receive new waste.[118] And siting brand new facilities within a reasonable distance of coal-fired power plants is far easier said than done. In short, Reidinger was right the first time: new, more stringent rules would prove costly precisely because they would have required extensive retrofitting of old, unstable dumps that are vulnerable to the same engineering failures that caused the Kingston spill.

Consider the following daunting statistics about existing surface impoundments. In the wake of the Kingston spill, the EPA undertook an investigation of existing surface impoundments' integrity, finding that 109 of 584 such facilities nationwide had either a "high" or a "significant" hazard potential rating.[119] In addition, 186 of the units were not designed by a professional engineer.[120] Although the impoundments were designed to last for about 40 years, 56 were older than 50 years old and 360 were between 26 and 40 years old.[121] Moreover, 35 units at 25 facilities had already reported releases, ranging from minor spills to the massive release at the Kingston facility.[122] Indeed, further scrutiny at the Kingston facility revealed significant safety deficiencies at a second site on its property.[123]

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117. *See infra* note 136.

118. Hazardous and Solid Waste Management System, 75 Fed. Reg. 35,128, 35,133:

> EPA is proposing to list as a special waste, to be regulated under the RCRA subtitle C regulations, CCRs from electric utilities and independent power producers when destined for disposal in a landfill or surface impoundment. These CCRs would be regulated from the point of their generation to the point of their final disposition, including during and after closure of any disposal unit. This would include . . . corrective action, including facility-wide corrective action, closure of units, and post-closure care . . . .

119. Hazardous and Solid Waste Management System, 75 Fed. Reg. 35,128.

120. *Id.*

121. *Id*.

122. *Id.*

123. *Id.*

TVA is a corporation owned by the U.S. government, supplying nine million customers, employing 12,000 people, ranking first among American utilities in energy sales and fifth in generating capacity, and serving Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia.[124] As a publicly-owned utility, TVA is immune from the pressures of share price and private investment. As a very large electric utility, TVA delivers a crucial product, the manufacture of which is subject to the same risks of catastrophic equipment and facility failure that confront its for-profit competitors. In other words, the dangerously myopic institutional culture revealed by the Kingston spill could easily plague other utilities, turning TVA from a "one off" rogue to an urgent example of bad things to come.

## III. THE RESPONSE: ONE STEP FORWARD AND TWO STEPS BACK

### *A. The EPA Steps Forward*

To the great consternation of the electric-utility industry, the November 2008 election results seemed to change the political dynamic for regulating the environmental harm caused by power plants. As a young and apparently progressive president prepared to enter the Oval Office and the Democratic Party assumed control of both houses of Congress, the Kingston catastrophe raised the profile of coal-ash disposal, with national media filling the dead week between Christmas and New Year's Day with images of inundated homes and a river covered with grey ooze. The stage was set for an unprecedented federal response to the root cause of the disaster.

The Environmental Integrity Project, a prominent national environmental group, demanded that the EPA promulgate national regulations governing coal-ash disposal.[125] Earthjustice, the premier litigating arm of the environmental movement, published a report entitled *Waste Deep: Filling Mines with Coal Ash is Profit for Industry, but Poison for People*, detailing the risks posed by dumping coal ash directly in abandoned mines.[126] More than 100 environmental

124. TENNESSEE VALLEY AUTHORITY, http://www.tva.com/abouttva/index.htm (last visited Nov. 27, 2012).

125. Charlotte E. Tucker, *Earthjustice Calls on EPA to Regulate Mine Storage, Disposal of Coal-Ash Waste*, 40 ENV'T REP. CUR. DEV. (BNA) 171 (Jan. 23, 2009).

126. EARTHJUSTICE, WASTE DEEP: FILLING MINES WITH COAL ASH IS PROFIT FOR INDUSTRY, BUT POISON FOR PEOPLE (2009), *available at* http://earthjustice.org/sites/default/files/library/reports/earthjustice_waste_deep.pdf. In 2008, EPA estimated that approximately eight percent of the 136 million tons of coal ash generated that year was dumped into

organizations signed a letter to newly appointed EPA Administrator Lisa Jackson urging her to "chart a new, responsible course" for regulating CCRs.[127]

Jackson was receptive. Calling the Kingston spill "one of the largest and most serious environmental releases in our history,"[128] she announced on March 9, 2009 that her agency was in the process of developing regulations for coal-ash disposal.[129] These regulations would address the serious problem of unstable surface impoundments.[130] To build a record in support of a protective proposal, the EPA sent information requests to 150 power plants owned by more than fifty utilities seeking data on the structural integrity of those units.[131] Agency officials said they hoped to publish a proposed rule by the end of the year.[132]

The Kingston catastrophe also generated a great deal of activity in Congress, which held no fewer than six hearings on the causes of the spill, the nature and scope of the coal ash disposal problem, and methods of preventing a recurrence.[133] Several members urged the EPA to regulate disposal under RCRA, the premier federal waste

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abandoned mine shafts. Hazardous and Solid Waste Management System, 75 Fed. Reg. 35,128, 35,151.

127. Charlotte E. Tucker, *Advocacy Groups Ask EPA to Take Lead on Regulating Coal-Combustion Waste*, 40 ENV'T REP. CUR. DEV. (BNA) 494 (Mar. 6, 2009).

128. Janice Valverde, *Tennessee Valley Authority, EPA Agree on $950 Million Cleanup of Coal Ash Spill*, 40 ENV'T REP. CUR. DEV. (BNA) 1116 (May 15, 2009).

129. Charlotte E. Tucker, *EPA to Propose Coal-Ash Rule by Year's End, Asks Utilities For Data on Ash Impoundments*, 40 ENV'T REP. CUR. DEV. (BNA) 552 (Mar. 13, 2009).

130. *Coal Combustion Byproducts: Potential Impact of a Hazardous Waste Designation on Small Businesses in the Recycling Industry, Hearing Before the Subcommittee on Rural Dev., Entrepreneurship and Trade of the House Small Business Committee*, 111th Cong., 2d Sess. (2010) (testimony of Lisa Felt, EPA); Charlotte E. Tucker, *EPA Says Balance Needed Between Handling of Coal Combustion Waste, Beneficial Reuse*, 40 ENV'T REP. CUR. DEV. (BNA) 1064 (May 8, 2009).

131. Tucker, *supra* note 125.

132. *Id.*

133. *Ash Spill Causes Hearing*, *supra* note 14; *Coal Combustion Byproducts: Potential Impact of a Hazardous Waste Designation on Small Businesses in the Recycling Industry, Hearing Before the Subcommittee on Rural Dev., Entrepreneurship and Trade of the House Small Business Committee*, *supra* note 14; *Coal Combustion Waste Storage and Water Quality, Hearings Before the Subcommittee on Water Resources and the Environment of the House Committee on Transportation and Infrastructure*, *supra* note 14; *The Tennessee Valley Authority's Kingston Ash Slide: Potential Water Quality Impacts of Coal Combustion Waste Storage, Hearings Before the House Committee on Transportation and Infrastructure*, *supra* note 14; *Hearings before the Subcommittee on Energy and Mineral Resources of the House Committee on Natural Resources*, *supra* note 14; *Oversight Hearing on the Tennessee Valley Authority and the Recent Major Coal Ash Spill, Hearing Before the Senate Committee on Environment and Public Works*, *supra* note 14.

disposal statute.[134] Congressman Nick Rahall (D-WV), the chairman of the House Natural Resources Committee, introduced a bill that would have required the Department of the Interior to promulgate regulations containing federally enforceable requirements for the storage and disposal of CCRs.[135]

In October 2009, the EPA sent the draft of a proposed rule to Cass Sunstein, the White House "regulatory czar," known more formally as the administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).[136] That document, referred to here as the "Original EPA Proposal," stated the agency's intention to regulate coal ash as a hazardous waste under Subtitle C of RCRA.[137] The draft preamble to the proposal cited two distinct categories of harm that justified imposing stringent federal controls on disposal: (1) the migration of toxic constituents of the ash into the environment, especially groundwater; and (2) the probable recurrence of spills like the one in Kingston.[138] In keeping with the theme of responses to disasters, we

134. *See* Charlotte E. Tucker, *EPA Pledge to Regulate Coal Ash Leads Rahal to Abandon Interior Legislation*, 40 ENV'T REP. CUR. DEV. (BNA) 552 (Mar. 13, 2009) (Rep. Nick Rahall urges EPA to promulgate CCR regulations under RCRA); Charlotte E. Tucker, *Coal Ash Regulation May Need to Change, TVA President Testifies at Senate Hearing*, 40 ENV'T REP. CUR. DEV. (BNA) 108 (Jan. 16, 2009) (Rep. Edward Markey (D-Mass.) wants "to know what the EPA is doing to protect the public from the hazards of these toxic coal ash ponds"); Steven D. Cook & Linda Roeder, *Jackson Pledges Review of EPA Policies But Avoids Specifics on Possible Changes*, 40 ENV'T REP. CUR. DEV. (BNA) 122 (Jan. 16, 2009) (Sen. Barbara Boxer (D. Cal.) urges EPA to regulate CCR wastes under RCRA).

135. Charlotte E. Tucker, *Bill Would Require Coal Combustion Waste Regulation Under Surface Mining Control Act*, 40 ENV'T REP. CUR. DEV. (BNA) 171 (Jan. 23, 2009).

136. The EPA has posted two versions of its draft proposal for regulation concerning the disposal of coal combustion residuals from electric utilities, hazardous substance designation, and reportable quantities of residuals. For the original draft, see ENVTL. PROT. AGENCY, HAZARDOUS WASTE MANAGEMENT SYSTEM; IDENTIFICATION AND LISTING OF HAZARDOUS WASTE; DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES AND CERCLA HAZARDOUS SUBSTANCE DESIGNATION AND REPORTABLE QUANTITIES (Oct. 16, 2009), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0013 [hereinafter ORIGINAL EPA PROPOSAL]. The second version includes red-lining incorporated during reviews by and negotiations with OIRA. ENVTL. PROT. AGENCY, HAZARDOUS WASTE MANAGEMENT SYSTEM; IDENTIFICATION AND LISTING OF HAZARDOUS WASTE; DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES AND CERCLA HAZARDOUS SUBSTANCE DESIGNATION AND REPORTABLE QUANTITIES (May 3, 2009), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0012. The two versions of the draft proposal are available in an online docket of federal regulation material. *Docket on Coal Ash*, REGULATIONS.GOV, http://www.regulations.gov /#!docketDetail;D=EPA-HQ-RCRA-2009-0640 (last visited Sept. 30, 2012) [hereinafter *Docket on Coal Ash*].

137. Solid Waste Disposal Act, 42 U.S.C. §§ 6921–6939f (2006 & Supp. II 2008).

138. *See* ORIGINAL EPA PROPOSAL, *supra* note 136, at 62.

focus here only on the second threat. Indeed, we must confess that we have never fully understood the de-emphasis of potentially massive structural failures by the national environmental community.[139] Although the pollution of groundwater by coal-ash facilities poses potentially serious, long-term risks, it represents a more attenuated threat to public health than massive spills. Moreover, the groundwater threat is difficult to quantify without extensive investigation that requires the installation of expensive monitoring equipment and complicated modeling of the movement of plumes of contamination within aquifers. In contrast, images of Kingston in the aftermath of the spill, a mere two clicks away on YouTube, are easy to understand and quite disturbing.[140]

The EPA's original proposal would have profoundly changed existing disposal practices. The owners and operators of coal-fired power plants could no longer have kept sludge in open, unlined pits in the ground, but would instead have been required to send the ash to landfills and surface impoundments that met far more protective design requirements, including the installation of liners, impermeable (rain-proof) covers, and leachate-detection systems.[141] The EPA would have been responsible for determining those design standards, although state regulators would have remained responsible for enforcing individual facility permits in most places.[142] Federal and state regulators would have had the authority to compel "corrective action" at existing coal ash impoundments where outmoded designs, imprudent engineering, geography, or other factors created a hazard to public health or the environment.[143]

Yet these changes (and their admittedly steep costs) were not the frame of reference selected by electric utilities and their allies for a well-funded, politically shrewd, and, in the end, extraordinarily effective campaign against the EPA initiative. Had the utilities

139. Earthjustice and the Environmental Integrity Project, the two most active groups, have consistently emphasized groundwater contamination. *See, e.g.*, JEFF STANT, EARTHJUSTICE, ENVTL. INTEGRITY PROJECT & SIERRA CLUB, IN HARM'S WAY: LACK OF FEDERAL COAL ASH REGULATIONS ENDANGERS AMERICANS AND THEIR ENVIRONMENT (2010), *available at* http://earthjustice.org/sites/default/files/files/report-in-harms-way.pdf.

140. *See, e.g.*, Mountain Justice, *TVA Coal Ash Disaster,* YOUTUBE.COM (Dec. 23, 2008), http://www.youtube.com/watch?v=rGmVCABMRRQ; VidXPress, *TVA Coal Ash Spill in Kingston, TN*, YOUTUBE.COM (July 22, 2011), http://www.youtube.com/watch?v=dO9k7gMObe8.

141. *See* ORIGINAL EPA PROPOSAL, *supra* note 136, at 311–12.

142. *Id.* at 236–37.

143. *Id.* at 61–62.

complained about disposal costs, not only would they have isolated themselves, they would have focused attention on the state of ill-repair of existing facilities, inevitably drawing a stark contrast between huge open pits like the one TVA operated in Kingston and the new, better-engineered facilities required by the EPA's proposal. Instead, the utilities recruited an unusually broad cross-section of industry groups to argue that the EPA's proposal would discourage the beneficial reuse of coal ash with devastating economic consequences.[144] The coalition of opponents included companies using the ash to make concrete and wallboard, as well as large construction companies using it to line roadbeds.[145] They offered to accept further regulatory controls on coal-ash disposal, but only if the content and implementation of those requirements were left to the discretion of individual states—a state of affairs that was in essence the *status quo*.[146]

The EPA estimated that about 37 percent of the 136 million tons of coal ash generated—or about 50.1 million tons—was beneficially reused in 2008.[147] Because the agency's rulemaking proposal explicitly *exempted* any and all coal ash subject to "beneficial reuse"—a wide-open category of purposes that the EPA has not yet defined—opponents were compelled to make a more elaborate argument.[148] They contended that because coal ash would be labeled a hazardous waste when discarded, recycled coal ash would pick up a "stigma" in the marketplace.[149] People would be afraid to buy it for any purpose because someday they might be sued for using it. No one ever explained how consumers would discover that coal ash lay in a road bed or within a piece of wallboard, much less how individuals would be able to successfully sue manufacturers or construction companies for tangible harm so long as the toxic elements of the ash remained encapsulated. And, of course, if toxic elements could escape from

144. Charlotte E. Tucker, *As EPA Plans on Coal Ash, Industry Cautions Against Sweeping Change*, 40 ENV'T REP. CUR. DEV. (BNA) 552 (2009).

145. Janice Valverde, *Coal Ash Comments Number Over 200,000; Industry, Environmentalists Sharply Disagree*, 41 ENV'T REP. CUR. DEV. (BNA) 2931 (2010).

146. *Utility Industry to EPA: Please Regulate Coal Ash*, POLLUTION ENGINEERING, June 1, 2009, at 9 (stating that groups "would welcome additional oversight" if coal was regulated as a non-hazardous waste. Non-hazardous wastes are regulated under the Solid Waste Disposal Act, which establishes minimum federal guidelines for state-implemented and designed plans. *See* 42 U.S.C. §§ 6941–6947 (1984).).

147. Hazardous and Solid Waste Management System, 75 Fed. Reg. 35,128, 35,151.

148. *Id.* at 35,160.

149. Avery Fellow, *EPA Must Consider Beneficial Use Data In Coal Ash Final Rule, Industry Groups Say*, 42 ENV'T REP. CUR. DEV. (BNA) 2694 (2011).

such products, the coal ash would have been re-used, but not beneficially.

### *B. The White House Steps Back*

#### 1. Centralized Review in Practice

When the EPA did not retreat in the face of the industry coalition's spirited opposition, business groups took their objections to OIRA, the obscure but extraordinarily powerful White House unit that Harvard Law School Dean Martha Minow once called "an office that most people have never heard of."[150] OIRA is responsible for a potent system of centralized White House review of regulatory proposals from all the agencies and departments in the Executive Branch.

White House regulatory oversight began at the same time that Congress passed a wide variety of progressive laws protecting consumers, workers, and breathers from fraud, safety hazards on the job, and pollution. With the notable exception of the Food and Drug Administration (FDA),[151] the most important health, safety, and environmental agencies were created during an extraordinary period of law reform in the early 1970's that was driven by young people's protests against the Vietnam War and their parents' concern that, in the absence of a revitalized government, baby boomers would remain perpetually alienated from their country.[152] The industries brought under the ambit of these ambitious new regulatory regimes successfully demanded that White House allies of a more conservative bent ride herd over the reformers in the regulatory agencies. From the beginning, as Professor Robert Percival has noted,

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150. Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 994 (2001) (referring to Harvard Law School Dean Martha Minow's introduction of Sunstein on March 1, 2010). For a more complete exploration of the extraordinary influence of centralized White House review in shaping health, safety, and environmental regulation over four decades, *see* Steinzor, *supra* note 23.

151. The FDA was created in 1906 in response to fraud surrounding the marketing of ineffective and even dangerous remedies. Act of June 30, 1906, ch. 3915, 34 Stat. 768, *repealed by* Federal Food, Drug, and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (1938); James Harvey Young, *The Medical Messiahs: A Social History of Health Quackery in Twentieth Century America*, 160 SCI. 643, 644 (1968).

152. Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. App. at 643 (2006), *and in* 84 Stat. 2086 (1970) (establishing EPA); Consumer Product Safety Act, Pub. L. No. 92–573, § 4(a), 86 Stat. 1207, 1210 (1972) (codified as amended at 15 U.S.C. § 2053(a) (2006)) (establishing CPSC); Occupational Safety and Health Act of 1970, Pub. L. No. 91–596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651 (2006)) (establishing OSHA); Highway Safety Act of 1970, Pub. L. No. 91–605, § 202, 84 Stat. 1714, 1739 (codified as amended at 49 U.S.C. § 105 (2006)) (establishing NHTSA).

the distinctive strategy for the regulated industries was the "inside game," negotiating behind closed doors for the changes they desired, while environmentalists, consumer groups, and organized labor went "outside" to reformers in Congress, publicizing the human costs of the corporate malfeasance they wanted to address.[153]

As the ink was drying on the landmark reforms of the early 1970's, the Nixon Administration's Secretary of Commerce, Maurice Stans, persuaded chief domestic policy advisor John Ehrlichman to establish a taskforce to oversee the EPA's regulatory activities.[154] This type of oversight continued throughout the 1970's, embraced by Democratic President Jimmy Carter, who appointed his budget director Bert Lance to spearhead those efforts.[155] At the close of the Carter Administration, Congress passed two statutes that codified the White House's regulatory role: the Regulatory Flexibility Act and the Paperwork Reduction Act; the second statute established OIRA.[156] The new office was assigned to review any proposal by a government agency or department to compel individual citizens, private sector entities, and state and local governments to fill out new paperwork.[157] As President Ronald Reagan entered office intent on rolling back regulation, OIRA was available to implement new protocols. Executive Order (EO) 12,291,[158] issued shortly after the Reagan Administration took office, contained the following trio of no-nonsense instructions:

1. All covered agencies[159] must refrain from taking action unless potential benefits outweigh potential costs.[160] The agencies

153. *See* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 134–38 (1991).

154. *See id.* at 132–33.

155. *See id.* at 142.

156. Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–612 (2006)); Paperwork Reduction Act of 1980, Pub. L. No. 96–511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501–3520 (2006)).

157. Paperwork Reduction Act of 1980, Pub. L. No. 96–511, 94 Stat. 2812, 2814–15 (1980) (codified as amended at 44 U.S.C. §§ 3501–3520 (2006)).

158. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982).

159. The order—and all subsequent regulatory review orders—exempt independent regulatory agencies, such as the Federal Trade Commission and the Securities and Exchange Commission, but covers all Cabinet departments and free-standing executive branch agencies such as EPA. *See* Memorandum from Cass R. Sunstein, OIRA Adm'r., to the Heads of Indep. Regulatory Agencies (July 22, 2011) *available at* http://www.whitehouse.gov/sites/default/files/omb/memorandum/2011/m11-28.pdf.

160. Exec. Order 12,291, §2(b), 3 C.F.R. § 127 (1981).

must also consider regulatory alternatives that involve the lowest net cost.[161]

2. Agencies must prepare a "regulatory impact analysis" (RIA) containing their cost-benefit analysis for each "major" rule, defined to include any proposal that would have an annual effect on the economy of $100 million or more.[162]
3. Agencies must send a copy of each proposed and final rule to OIRA before it is published in the *Federal Register*.[163] Agencies must respond to any concerns raised by OIRA staff.[164]

The Reagan Administration spent a great deal of time and political capital fighting with congressional reformers, especially the generation of bright, young, liberal congressmen elected in the immediate aftermath of Watergate. Henry Waxman (D-CA) and subcommittee chairman on the powerful House Energy and Commerce Committee, James Florio (D-NJ), took the lead in resisting deregulation, especially in the context of environmental protection.[165] OIRA was at the forefront of these controversies. George H.W. Bush continued in the direction set by Reagan, albeit with considerably less *sturm und drang*.[166] The Democrats' return to the presidency with the election of Bill Clinton assuaged congressional Democrats' opposition to OIRA, in part because the new administration replaced the Reagan executive orders with an apparently more moderate set of procedures.[167]

The new Clinton EO 12,866, which persists to this day, authorizes OIRA to review "significant" rules (such as requirements that would impose economic effects over $100 million annually or "adversely affect" the economy "in a material way").[168] But it imposes

161. *Id.* § 3(d)(4).

162. *Id.* §§ 1(b)(1), 3(d)(4).

163. *Id.* § 3(c).

164. *Id.* § 3(f)(2).

165. For a vivid description of these events, *see* David Osborne, *State of Siege: Can Democrats Mastermind the Great Escape?*, MOTHER JONES, Feb.–Mar. 1982, at 22, 22–31. Professor Steinzor worked for Representative Florio at that time as staff counsel to the Subcommittee on Commerce, Transportation, and Tourism of the House Energy and Commerce Committee that he chaired, and they worked closely with Representative Waxman's Subcommittee on Health.

166. Steinzor, *supra* note 23, at 245.

167. *Id.* at 245–47.

168. Exec. Order No. 12,866, §§ 3(f)(1), 3 C.F.R. 638 (1994).

a series of mandatory deadlines for the conclusion of review[169] and instructs OIRA to "make available to the public" all documents that it sent back and forth to the rulemaking agency or department.[170] These "before-and-after" documents allow stakeholders to track changes that are made during the review process. President Clinton continued the use of cost-benefit analysis.[171] As a practical matter, OIRA kept a far lower profile during the Clinton Administration; it stayed out of the media and sharply decreased its workload, reviewing between 500 and 700 rules annually in contrast to 2,000 and 3,000 under Reagan and Bush.[172] But President Clinton's enthusiasm for a strong OIRA presence made it a bipartisan institution, entrenching centralized White House regulatory review.

Under President George W. Bush, OIRA returned to the aggressive Reagan model. The new President shrewdly retained Executive Order 12,866, creating the appearance that he was merely continuing a long-standing tradition. But OIRA returned with enthusiasm to its higher profile "gatekeeper" role.[173] Under the leadership of John Graham (2001–2006) and Susan Dudley (2006–2009), OIRA significantly increased the number of "return letters" it sent to the agencies, demanding that they reconsider regulatory proposals.[174] Economic analysis became the critical factor in deciding the content of rules, especially in the environmental arena where most were statutorily mandated, with deadlines for their production.[175] Graham rewrote OIRA's guidance regarding the methodologies agencies must use to conduct cost-benefit analysis to make them far more elaborate.[176]

The other Bush II Administration change was OIRA's energetic assertion of jurisdiction over science policy. John Graham realized that the justification for many of the health, safety, and

169. *Id.* § 6(b)(2).

170. *Id.* § 6(b)(4)(D).

171. *Id.* § 6(a).

172. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 10 (2009).

173. *Id.* at 19.

174. *Id*.

175. For a more detailed description of these events, *see* Steinzor, *supra* note 23, at 247–54.

176. *Compare* OFFICE OF MGMT. & BUDGET, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER EXECUTIVE ORDER 12866 (1996), *available at* http://georgewbush-whitehouse.archives.gov/omb/inforeg/riaguide.html, *with* OFFICE OF MGMT. & BUDGET, CIRCULAR A–4 (2003), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/.

environmental regulations that economists considered to be inefficient arose from the "precautionary principle," which holds that government should not wait for scientific certainty to take action to control emerging threats.[177] By challenging the protective assumptions government scientists had been making during the process of assessing risk, Graham and his staff hoped to curtail regulation without admitting that they were making policy decisions to take a less rigorous approach toward emerging threats. Their efforts had mixed results: OIRA intruded on all aspects of rulemaking with impunity, but its effort to adopt government-wide guidance specifying how agencies and departments should perform risk assessments was repudiated by the National Academies of Science, among other critics.[178] Nevertheless, as the Bush II Administration trailed to a close, OIRA was once again in the prominent, albeit controversial role of riding herd on the agencies and departments—especially the EPA—as those proposals were developed.

During his first presidential campaign, Barack Obama defined the role of government as helping people when they cannot help themselves, allowing progressives to hope that he would advocate strong policies to reverse the deregulatory neglect of the Bush II years.[179] The newly elected President sent signals at the outset of his Administration that he would implement such changes, selecting a roster of experienced and well-respected appointees to head the health, safety, and environmental agencies, especially Lisa Jackson at the EPA. But the President's enthusiasm waned as seemingly more urgent problems competed for his attention. He did not fight for badly needed increases in the EPA's deflated budget nor did he support his appointees when they were attacked by Republicans and conservative Democrats.[180] Most disturbing, he showed no enthusiasm

177. *See, e.g.*, David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 ENVTL. HEALTH PERSP. 871, 871–72 (2001).

178. Steinzor, *supra* note 23, at 249–51.

179. *See, e.g.*, Barack Obama, President, Closing Argument Speech at the Canton Memorial Civic Center (Oct. 27, 2008) (transcript available at http://blogs.suntimes.com/sweet/2008/10/obama_closing_argument_speech_1.html).

180. Modest increases in some agency budgets were proposed but were quickly eclipsed by deficit politics, with the President hastening to make deals with Republicans and paving the way for deep cuts in the funding available to implement those protections. *See, e.g.*, Jim Efstathiou, *EPA Budget Cut Will Restrict Enforcement of Clean-Air Rules, Activists Say*, BLOOMBERG.COM (Apr. 12, 2011), http://www.bloomberg.com/news/2011-04-12/epa-budget-cut-will-restrict-enforcement-of-clean-air-rules-activists-say.html. The President has not defended the mission of the agencies or the performance of the people he appointed to lead them in the face of blistering Republican attacks on alleged overregulation, except in the context of explaining how

for updating the outmoded laws that crippled agency efforts to curtail chronic violations.[181]

The President's ambivalence towards these agencies was crystallized in his appointment of Harvard Law School professor Cass Sunstein as OIRA Administrator. Sunstein was well-known in academic circles as a critic of the precautionary principle and a supporter of quantitative cost-benefit analysis.[182] Business groups and conservative commentators hailed his appointment.[183] And it was easy to see why. In the aftermath of the 2010 midterm elections, with radical conservatives in the House of Representatives launching the most withering campaign against the regulatory system since Newt Gingrich's 104th Congress, Sunstein helped President Obama pivot to a new strategy that attempted to deflect the accusation that his Administration was hostile to business by launching his own version of a regulatory witch-hunt.

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far he is willing to go to eliminate unnecessarily burdensome regulations. *See, e.g.*, Alan Fram, *Obama's Push to Revamp Regulations*, WASH. POST, May 30, 2011, at A21 ("Overall, the drive would save hundreds of millions of dollars annually for companies, governments and individuals and eliminate millions of hours of paperwork while maintaining health and safety protections for Americans, White House officials said.").

181. The President was missing in action during congressional debate regarding legislation to strengthen regulation of deepwater oil production and mine safety. This approach was emblematic of the administration's reluctance to put much political capital on the line in the health, safety, and environmental arenas. *See, e.g.*, Vicki Smith, *MSHA to Congress: Mine Safety Laws Need to Be Stronger*, HUFFINGTON POST (Mar. 3, 2011), http://www.huffingtonpost.com/2011/03/03/msha-congress-minesafety_n_830841.html ("MSHA chief Joe Main . . . told the chairman, Republican Rep. Tim Walberg of Michigan, he was not recommending any particular legislation.").

182. *See, e.g.*, CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005). *Laws of Fear* is an attack on the precautionary principle, which Sunstein describes as "literally incoherent" in "its strongest forms." *Id.* at 4. He explains that the strong form of this principle requires regulation "whenever there is a possible risk to health, safety, or the environment, even if the supporting evidence remains speculative and even if the economic costs of regulation are high." *Id.* at 24. He contends that powerful and irrational social forces feed average citizens' overreaction to risk. Because non-experts have difficulty factoring in the probability that a risk would occur and instead panic in response to harm that has a very small chance of occurring, "the public's demand for government intervention can be greatly affected by probability neglect, so that regulators may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that dangers will ever come to fruition." *Id.* at 69. Sunstein sees these reactions as so extreme that he recommends keeping the public from influencing government decisions that involve such risks: "[T]here is [a risk that] high levels of public participation in technical domains [will] simply heighten public fear, with unfortunate consequences for policy." Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1161 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)).

183. *See, e.g.*, David Frum, *Is the Right Still Afraid of Cass Sunstein?*, FRUMFORUM.COM (May 26, 2011, 8:48 AM), http://www.frumforum.com/is-the-right-still-afraid-of-cass-sunstein/.

In January 2011, President Obama took the unusual step of publishing a *Wall Street Journal* column pledging to establish a "21st-century" system that would eliminate "dumb" rules and avoid "excessive, inconsistent, and redundant regulation."[184] New EO 13,563 followed on the heels of this pronouncement, directing agencies to develop plans for identifying "outmoded, ineffective, insufficient, or excessively burdensome" rules and "to modify, streamline, expand, or repeal them."[185] The President reiterated these instructions in a second EO a year later, further ordering agencies to move to the front of the line any new rules that would reduce "cumulative" regulatory burdens on a given industrial sector.[186] Supervised closely by OIRA administrator Sunstein, the agencies struggled to find poster children for overregulation that, once identified and publicized, would have the effect of admitting that the originating agency had done some very stupid things in the past.[187] Ironically, despite the significant impact these initiatives had on slowing the Obama Administration's rulemaking efforts,[188] conservative critics on Capitol Hill and in the business community gave President Obama no

184. Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17; *see also* Cass Sunstein, Op-Ed., *21st-Century Regulation: An Update on the President's Reforms*, WALL ST. J., May 26, 2011, at A17.

185. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821–22 (Jan. 18, 2011).

186. Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012).

187. One excellent example of this pitiable yet damaging syndrome is the President's 2012 State of the Union address that ridiculed an EPA "rule" requiring farmers to have a spill prevention plan for large tanks containing milk. Barack Obama, President, State of the Union Address (Jan. 24, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address. Typically, such plans are required at facilities storing potentially hazardous substances like crude oil so that if the tank fractures, the spill is contained and does not run into rivers and streams. Milk was covered because in large quantities it could harm water quality, although the EPA never enforced the rule and ultimately decided to exempt the tanks because they were already required to be carefully monitored under Department of Agriculture regulations. Regardless, the President gave people watching the speech yet another reason to disdain regulations and regulatory agencies. *See* Cary Coglianese, *Taking Regulation Seriously*, REGBLOG (Jan. 28, 2012), https://www.law.upenn.edu/blogs/regblog/2012/01/taking-regulation-seriously.html.

188. For analyses of this slowdown, *see generally* AMY SINDEN, ET AL., CTR. FOR PROGRESSIVE REFORM, TWELVE CRUCIAL HEALTH, SAFETY, AND ENVIRONMENTAL REGULATIONS: WILL THE OBAMA ADMINISTRATION FINISH ON TIME? (2011), *available at* http://www.progressivereform.org/articles/12Rules_1106.pdf; RENA STEINZOR & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, OPPORTUNITY WASTED: THE OBAMA ADMINISTRATION'S FAILURE TO ADOPT NEEDED REGULATORY SAFEGUARDS IN A TIMELY WAY IS COSTING LIVES AND MONEY (2012), *available at* http://www.progressivereform.org/12RulesIssueBrief.cfm.

credit whatsoever for blunting the impact of "job killing" regulation.[189]

2. Coal Ash Protections and the "Stigma Effect"

Despite the impression created by its broad jurisdiction and aggressive assertions of control over regulatory policy, OIRA is a small office, with about three dozen "desk officers" and "branch chiefs" responsible for reviewing some 700 regulatory matters annually.[190] OIRA reviews both proposed and final rules, and given the complexity of many of these rules, its career employees use what is best described as deterrence-based review: they single out a handful of controversial rules for well-publicized attention, thereby signaling that agencies better have covered all their cost-benefit bases and placated their most committed industry foes long before their paperwork hits the economists' desks. Coal ash is a prominent example of this strategy.

Almost as soon as rumors of the EPA's ambitious proposal to declare coal ash a hazardous waste under Subtitle C of RCRA hit K Street, the *de facto* headquarters of the capitol's business lobbyists, opponents initiated an unprecedented siege on OIRA, demanding help in suppressing Jackson and her staff.[191] OIRA staff sat through forty-seven separate meetings with organizational representatives interested in the EPA proposal, an especially egregious number given the ample opportunities that interested parties already had to explain their reasoned, evidence-based opposition to the EPA in a rulemaking record posted on the worldwide web.[192] Two-thirds of these meetings involved industry and state representatives opposing the rule, while the remainder involved environmental groups supporting it.[193]

189. *See* Andrew Zajac, *Agencies Told to Weigh Effects of Business Rules in the U.S.*, BLOOMBERG.COM (Mar. 20, 2012), http://www.bloomberg.com/news/2012-03-20/agencies-told-to-weigh-effects-of-business-rules-in-u-s-.html ("The top regulatory official at the Washington-based U.S. Chamber of Commerce, the nation's largest business-lobbying group, said Sunstein's office hasn't listened to the group's complaints about redundant rules.").

190. COPELAND, *supra* note 172, at 28.

191. For a detailed description of these events, *see* Steinzor, *supra* note 23, at 260–68.

192. *See* James Goodwin, *Eye on OIRA: Coal Ash Meetings Up to 42*, CPR BLOG (Apr. 5, 2010, 11:12 AM), http://www.progressivereform.org/CPRBlog.cfm?idBlog=CE877002-A1A5-ADAC-34017AC4184F218A; *see also* Office of Mgmt. & Budget, Solid Waste and Emergency Response: Meeting Records, http://www.whitehouse.gov/omb/oira_2050_meetings/.

193. *See* Goodwin, *supra* note 192; *see also* Office of Mgmt. & Budget, *supra* note 192.

At least as troubling as this relentless lobbying blitz was TVA's involvement as a well-protected "interagency" stakeholder. Needless to say, it also opposed the rule, joined by its colleagues at the Department of Transportation, which spoke from its perspective as a builder of highways using recycled coal ash, and the Department of Energy, which stood up for electric utilities that own and operate coal-fired power plants, one of its most important constituencies. All three submitted informal comments trashing the EPA proposal to OIRA, which wrote them up as confidential "interagency" communications in direct contravention of the disclosure requirements of EO 12,866.[194] When EPA staff posted the interagency comments on its web-based rulemaking docket, a power struggle ensued; the document was briefly pulled off the web but then restored with a notation that such a brazen disclosure mistake would never happen again.[195] As Professor Steinzor has written previously, federal opponents of the coal ash proposal took on the features of a posse in a classic western, riding to support the OIRA sheriff's pursuit of the outlaw EPA.[196]

OIRA held onto the coal ash rule for seven months—well beyond the ninety-day review period allotted under EO 12,866—while it rewrote both the rulemaking notice and the EPA's regulatory impact statement.[197] Finally, in May 2010, a fundamentally different rulemaking notice emerged from OIRA, advancing three alternatives: (1) EPA's original option that coal ash be regulated as a RCRA Subtitle C hazardous waste; (2) an approach that would treat coal ash as a "solid" waste under RCRA Subtitle D when it is disposed on land, essentially leaving all regulatory decisions and enforcement to state discretion; and (3) a so-called "D prime" option that would allow all existing coal ash disposal landfills and surface impoundments to continue to function without change for the remainder of their useful lives.[198]

194. *See* EPA, Interagency Working Comments on Draft Rule Under EO 12866, at 1 (noting that these entities were contributors to the confidential process of commenting on draft rules), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0350.

195. For a more detailed description of this incident, *see* Steinzor, *supra* note 23, at 264.

196. *Id.* at 265.

197. *See* 42 U.S.C. §§ 6921–6939f.

198. The Federal Register notice setting forth these options only admits to two alternatives, although it explicitly raises the third, minimally protective proposal, calling it the "[subtitle] 'D prime' " approach. 75 Fed. Reg. 35,128, 35,134 (June 21, 2010).

We are convinced that raw political considerations lie at the heart of this decision to back away from the EPA's protective approach, thereby muddying the waters on the final outcome and sending the signal that the most stringent alternative was in deep trouble. OIRA, however, invented an elaborate rationale for these changes that invoked what has been one of Administrator Sunstein's central interests during his academic career—behavioral economics, or the semi-scientific study of why people do not always appear to behave as rational actors in certain decision-making contexts. As applied to regulation, behavioral economists attempt to overcome people's irrational preferences, or "heuristics," through various techniques that often trump direct government efforts to curb harmful industrial activities.[199] As mentioned earlier, electric utilities and their allies in the coal and construction industries focused their opposition to the EPA proposal on the notion that it would create a "stigma effect" that would destroy the recycling market because consumers of the products containing the ash would be deterred from buying the material by its designation as a hazardous waste when it was simply disposed of in regulated landfills.[200] As a result of the stigma effect, electric utilities would be compelled to pay significantly higher costs for disposal and their customers that now recycled coal

199. The benign version of Sunstein's preoccupation with this field is the book he wrote with Richard Thaler entitled N*udge*, which argues that the government should exercise benign paternalism by giving people options that are presented in a manner that overcomes their natural tendencies to make the worst choices. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS (2009). A considerably darker version of this theory, which attributes much of the protective environmental legislation enacted into law over the past three decades as unacceptably costly because people are irrationally afraid of toxic exposures, is presented in Sunstein's book, *Laws of Fear*, published in 2005. SUNSTEIN, *supra* note 182. For example, Sunstein excoriates residents of the Washington D.C. metropolitan area who tried desperately to stay out of the path of the snipers who killed ten people in a rampage during the fall of 2002:

> But there is something very odd about the extraordinary effects of the snipers' actions. For people in the area, the snipers caused a miniscule increase in risk. About 5 million people live in that area. If the snipers were going to kill one person every three days, the daily statistical risk was less than one in one million, and the weekly statistical risk was less than three in one million. These are trivial risks, far lower than the risks associated with many daily activities about which people do not express even the slightest concern. The daily risk was smaller than the one in one million risk from drinking 30 diet sodas with saccharin, driving 100 miles, smoking two cigarettes, taking ten airplane trips, living in a home with a smoker for two weeks, living in Denver rather than Philadelphia for 40 days, and eating 35 slices of fresh bread.

*Id.* at 90–91.

200. *See* EPA, REGULATORY IMPACT ANALYSIS FOR EPA'S PROPOSED RCRA REGULATION OF COAL COMBUSTION RESIDUES (CCR) GENERATED BY THE ELECTRIC UTILITY INDUSTRY 10–12 (2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003.

ash would stop doing so and would instead be compelled to pay more for virgin materials.[201]

OIRA's calculations of stigma costs in the Final Draft RIA came out to a whopping $233.5 billion in negative, or lost, economic and environmental benefits at the high end of its range of estimates.[202] The calculations assumed that if the strict EPA rule went into effect, approximately fifty-one percent of coal ash that is now recycled—some thirty-seven million tons—would be diverted to disposal in 2012, growing to about forty-one million tons annually by 2061.[203] The fifty-one percent assumption was never justified, and seemed at best to be a stab in the dark. But this potentially enormous price tag was extraordinary as these things go, and it hung an albatross around the proposal's neck that dragged it into the realm of the least possible.

Whether or not the lesson history takes from this episode is that the EPA's original, more stringent coal-ash proposal was killed for political—as opposed to cost-benefit—reasons, the chilling effect that this kind of far-fetched hypothesizing will have on the EPA and other health and safety agencies should not be underestimated. For the first time in our experience,[204] OIRA took the position that (1) if an agency declares an activity (disposing of CCRs in an unlined pit) or a material (CCRs themselves) to be hazardous, (2) related industries might change their conduct based on what economists believe to be irrational anxieties about those decisions, and (3) those "irrational" reactions might cost industry money over a 50-year period, then (4) the agency must quantify the costs of this stigma effect and (5) add them to the other costs of the action, all of which may (6) force the agency to pull back or terminate its efforts to protect public health. Virtually any decision to consider how toxic an under-tested chemical may be and whether its use should be restricted, to control the disposal of any harmful waste, or to require new performance standards for facilities that release pollutants into the environment could be found to have a stigmatizing effect on some aspect of commerce. This would trigger elaborate calculations of the effect's economic burden that could swamp the calculations of the benefit of regulatory controls. Given the power of this chilling effect on health,

201. For a detailed discussion of this issue, *see* Steinzor, *supra* note 23, at 264–69.

202. EPA, *supra* note 200, at 11, Exhibit 6, 187–88, Exhibit 5C-21 (2010).

203. 75 Fed. Reg. at 35,128.

204. We share a combined seven decades of working within, observing, and critically analyzing the regulatory system that protects public health, worker and consumer safety, and the environment.

safety, and environmental regulation, the record built by OIRA with respect to the stigma effect is shallow to the point of irresponsibility.

The Final Draft RIA does not contain *any* citations to sources describing how behavioral scientists define and evaluate the so-called stigma effect. It acknowledges, again without citation, that to the extent behavioral scientists have tried to quantify the stigma effect, they have never documented the drastic reduction assumed by OIRA's redraft—which is, that sales of recycled coal ash will drop by fifty percent.[205] Instead, stigma is accepted as a given not on the basis of previous, well-informed research and analysis but because affected industries intent on killing the EPA proposal claim it will occur.[206] An academic literature on the stigma effect exists, but OIRA's economists apparently chose to ignore it.

It turns out that an impressive roster of behavioral scientists have published an entire book analyzing the stigma effect through the prism of well-publicized controversies involving the contamination of food (mad cow disease or the discovery of polychlorinated biphenyls in milk) or drugs (tampering with Tylenol), the siting of nuclear-waste-disposal facilities, and toxic-waste dump sites.[207] The authors define stigma as people's revulsion against substances or practices that could prove harmful to their health.[208]

In one famous experiment, researchers dipped a "sterilized" cockroach in a glass of juice while their human subjects watched, and then asked people to drink from the glasses; most refused all such requests.[209] Similar experiments involving poisoned Tylenol and the tainted milk and meat that may derive from mad cows unsurprisingly

205. EPA, *supra* note 200, at 157–59.

206. *Id*. at 157 ("On the other hand, industry and state government stakeholders have asserted in letters to EPA, that regulation of CCR as a RCRA 'hazardous waste' will impose a 'stigma' on CCR beneficial use which will significantly curtail these uses. In their view, even an action that regulates only the disposal of CCR in landfills or surface impoundments as hazardous waste, but retains the Bevill exemption for beneficial uses, would have this effect.").

207. PAUL SLOVIC ET AL., RISK, MEDIA, AND STIGMA: UNDERSTANDING PUBLIC CHALLENGES TO MODERN SCIENCE AND TECHNOLOGY (James Flynn et al. eds., 2001) [hereinafter RISK, MEDIA, AND STIGMA].

208. *See, e.g.*, Baruch Fischhoff, *Defining Stigma*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 361 (defining stigma as the "refusal to engage in an act that would otherwise be acceptable"); Robin Gregory et al., *Technological Stigma*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 296.

209. Paul Rozin, *Technological Stigma: Some Perspectives from the Study of Contagion*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 31–33.

provided similar results: the average person exhibits revulsion over the contamination and is anxious to avoid exposure.[210]

Perhaps the OIRA economists ignored this research because the reaction of people asked to drink a contaminated beverage on its face has very little to do with how electric utilities respond to any regulation that could cost them money. One situation simply has very little to do with the other. It is tempting to surmise, however, that to the extent that they were familiar with this research, the OIRA economists did not want to highlight the behavioral scientists' recommended solutions to the stigma effect. To a person, the scientists urge government to combat stigma with public education, efforts to restore trust in government, and—ultimately—more protective regulation.[211] Had OIRA absorbed the research and these recommendations—had it, in fact, maintained an open mind and followed the implications of the behavioral research to its logical conclusion—the upshot might very well have been to either dismiss the stigma effect altogether or, at the very least, to assign it a much lower number. Instead, playing into the industry's strategy for killing the rule, OIRA ensured that EPA and Congress received the clear message that the rule was on shaky footing within the Obama Administration, and therefore vulnerable to the final stage of blood-sport policymaking.

### *C. Advertising and Astroturf*

A coalition of coal and utility companies spent around thirty-five million dollars on television advertising criticizing several EPA regulatory proposals, including the coal-ash rule.[212] One ad featured a businessman with a briefcase struggling to stay aboard a bucking bull while the narrator observed that "too many Americans are just trying to hang onto their jobs" and wondered why the EPA was "in a rush to

210. Michael R. Edelstein, *Crying over Spoiled Milk: Contamination, Visibility, and Expectation in Environmental Stigma*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 41–68; Douglas Powell, *Mad Cow Disease and the Stigmatization of British Beef*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 219–28; Mark L. Mitchell, *The Impact of External Parties on Brand-Name Capital: The 1982 Tylenol Poisonings and Subsequent Cases*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 203–17.

211. *See* Howard Kunreuther & Paul Slovic, *Coping with Stigma: Challenges and Opportunities*, *in* RISK, MEDIA, AND STIGMA, *supra* note 207, at 331, 334.

212. *See* Daniel J. Weiss, *Poor Little Big Coal Says EPA Smog Standards Too Expensive*, GRIST.ORG (Nov. 18, 2011), http://www.grist.org/coal/2011-11-17-poor-little-big-coal-says-epa-smog-standards-too-expensive; Anna Palmer & David Levinthal, *Energy Wars*, POLITICO.COM (Aug. 9, 2011), http://www.politico.com/politicoinfluence/0811/politicoinfluence74.html.

push regulations that would saddle Americans with higher energy costs and throw even more of us out of work?" The narrator then urged the viewer to tell Congress that "EPA needs to slow down."[213]

As it became clear that the EPA was serious about regulating coal ash as a hazardous waste, a group called Citizens for Recycling First appeared on the scene. Run by a consultant for the coal-ash recycling industry, it was an "Astroturf" group established by the industry to create the impression that ordinary citizens strongly opposed regulation of coal ash as a hazardous waste. In October 2011, the group took advantage of the White House's "We the People" program to submit a petition demanding that the Obama Administration not designate coal ash as a hazardous waste.[214] The group's website boasted that the petition had attracted more than 5,000 signatures, but a closer examination by the Environmental Integrity Project found that the names were probably generated by "a piece of software or a small group of individuals."[215]

### *D. Congress Strides Backwards*

As is becoming standard operating procedure in high-stakes rulemaking, the industry coalition opposing the EPA rule did not limit its work to the traditional strategies of lobbying EPA and OIRA officials and preparing voluminous comments on the Notice of Proposed Rulemaking (NPRM).[216] Instead, its lobbyists fanned out across Capitol Hill, asking members from states where affected companies were located to find ways to delay or terminate the rulemaking. This new strategy was significantly more effective following the 2010 midterm elections.

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213. America's Power, *Rodeo: The EPA Needs to Slow Down*, YOUTUBE.COM (Sept. 9, 2011), http://www.youtube.com/watch?v=xheNqLlhhFc.

214. *See White House Petition Drive Reaches Goal!*, CITIZENS FOR RECYCLING FIRST (Oct. 25, 2011), http://www.recyclingfirst.org/blog/?post=126.

215. *Meet Coal Ash's Fake New Chinese Friends: "Big Steamed Bun" and "Handsome Dragon,"* ENVTL. INTEGRITY PROJECT (June 28, 2012), http://www.environmentalintegrity.org/news_reports/06_28_2012.php. At least eighty of the names identified in Chinese characters referred to "objects or descriptions" like "Steamed Bun, Older Sister, Steamed Bun Little Sister, Small Steamed Bun, etc." *Id.*

216. For discussions of these blood sport strategies in other contexts, *see generally* McGarity, *supra* note 32 (considering the battle over debit card fees); Rena Steinzor, *The Age of Greed and the Sabotage of Regulation*, 47 WAKE FOREST L. REV. (forthcoming 2012) (describing these tactics in the context of a Department of Labor rulemaking proposal updating forty-year-old hazard orders prohibiting children who work on farms from engaging in certain activities).

The scene was set for such congressional intervention during the 2010 midterm elections, when candidates put forth by the Tea Party faction of the Republican Party routinely blamed many of the nation's economic problems on environmental regulation.[217] Whether or not these attacks had a decisive effect on the final vote, the electorate returned control of the House of Representatives to a Republican Party with a vocal Tea Party faction that was determined to prevent the EPA from promulgating more regulations. The mining and electric-utility industries contributed heavily to Republican candidates who took an anti-regulatory stance, and they were delighted with these election results.[218]

The coal and electric-utility industries hoped to persuade Congress either to prevent the EPA from finalizing pending regulations or, if that approach failed, to force the agency to make the regulations it did finalize less burdensome.[219] In response to a request by Representative Darrell Issa (R-CA) to nominate supposedly "job-threatening" regulations for repeal or withdrawal, thirteen different trade associations nominated the coal-ash rule.[220] During the first nine months of 2011, mining interests spent $16.5 million and electric utility interests spent $78.4 million on this and related lobbying activities.[221] Members of the American Public Power Association, a trade group representing publicly owned utilities in cities like Anaheim and Nashville, assembled in Washington, D.C. in early March 2011 to take their grievances about the EPA rules directly to individual members of Congress.[222]

The industry lobbyists were well-received by the Republican House majority. The tone of the congressional hearings on coal ash shifted dramatically as Republican chairpersons controlled the witness list. They stacked the hearings with industry representatives, and subjected EPA witnesses to lengthy, hostile questioning that

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217. Stephen Power, *Not on Ballot, but EPA Chief a Campaign Issue*, WALL ST. J., Oct. 8, 2010, at A4.

218. John M. Broder, *Coal Industry Spending to Sway Next Congress*, N.Y. TIMES, Oct. 30, 2010, at A12.

219. Philip Rucker & David S. Hilzenrath, *House GOP targets Obama regulations*, WASH. POST, Feb. 7, 2011, at A1.

220. *Id*.

221. Manuel Quinones, *Coal Industry Deploys Donations, Lobbying as Its Issues Gain Prominence*, N.Y. TIMES (Oct. 13, 2011), http://www.nytimes.com/gwire/2011/10/13/13greenwire-coal-industry-deploys-donations-lobbying-as-it-45582.html?pagewanted=all.

222. Lynn Garner, *EPA Plan to Limit Emissions Said to Pose "Imminent Threat" to Coal-Fired Power Plants*, 42 ENV'T REP. CUR. DEV. (BNA) 426 (2011).

sometimes pressed the boundaries of congressional decorum.[223] Sympathetic members supported stand-alone bills to divest the EPA of authority to regulate many aspects of power plant pollution, including coal ash. The Republican leadership was also receptive to attempts to circumvent the normal procedures for enacting legislation by attaching the contents of stand-alone bills to "must-pass" legislation, such as appropriations and transportation-reauthorization legislation, which was not likely to be killed in the Senate or vetoed by President Obama.

The first opportunity for Congress to halt EPA rulemaking was the continuing resolution that had to pass at the outset of the 112th Congress to appropriate funds for the government agencies for the remainder of the 2011 fiscal year.[224] Because President Obama would be very reluctant to veto the bill, triggering a government shutdown until a new continuing resolution could be passed, the legislation was virtually veto-proof. It did, however, have to get through the Democrat-controlled Senate. When the continuing resolution came to the floor of the House for a vote, Representative David McKinley (R-WV) offered a so-called "limitation" rider to prevent the EPA from expending any of the appropriated funds for the purpose of classifying coal ash as a hazardous waste.[225] This restriction would have effectively terminated the coal-ash rulemaking for the remainder of the fiscal year. Whether the agency could resume the rulemaking at the end of FY 2011 would depend on whether the FY 2012 appropriation contained a similar rider. The full House approved the rider, along with a number of other riders aimed at terminating ongoing EPA rulemaking initiatives. But the final deal on the continuing resolution reached among the Speaker of the House, Senate leaders, and President Obama removed the rider from the bill.[226] Environmental groups breathed a sigh of relief, although they realized that the continuing resolution battle was just "an opening act" for future battles over EPA rules.[227]

223. *See* McGarity, *supra* note 32, at 1726.

224. *See Senate Democrats Vow to Drop EPA Policy Measures from FY11 Budget Bill*, INSIDE EPA (Feb. 25, 2011), http://environmentalnewsstand.com/Inside-EPA/Inside-EPA-02/25/2011/menu-id-298.html (follow link to article).

225. 157 Cong. Rec. H. 1318, 1342 (2011).

226. Amena H. Saiyid, *EPA Riders Are Out of Spending Bill, But Analysts Say Battle Is Far from Over*, 42 ENV'T REP. CUR. DEV. (BNA) 816 (Apr. 15, 2011).

227. *Id.* (quoting Marty Hayden, Earthjustice).

Later that month, the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce held a hearing on a free-standing bill entitled the Recycling Coal Combustion Residuals Accessibility Act. That Act would have prohibited the EPA from regulating coal ash as a hazardous waste and given the states authority to regulate the disposal of CCRs.[228] The hearing featured testimony by EPA Assistant Administrator Mathy Stanislaus who told the committee that the problems with CCR retention ponds "could be addressed easily if disposal units were installed with proper liners, groundwater monitoring, and fugitive dust controls with an effective government oversight framework."[229] Underscoring the fact that the rule would not regulate beneficial uses of coal ash in any way, he stressed the need for "an effective oversight role to ensure CCR regulations are properly implemented and enforced."[230] He said that the agency preferred to consider all of the possible regulatory options, including regulating coal ash as a hazardous waste, and he complained that the bill would take that option away from the agency.[231]

Throughout the hearing, Republican congressmen took Stanislaus to task for the agency's failure to conduct an economic analysis that specifically focused on jobs in addition to the extensive economic analysis contained in the Draft RIA for the proposed rule.[232] Representative Cory Gardner (R-CO) berated Stanislaus for analyzing the impact of the rule on environmental justice, but not the impact on jobs.[233] When Representative David McKinley (R-WV) pressed Stanislaus to give his opinion as to whether coal ash was toxic, Stanislaus pointed out that the agency was "in the middle of a rulemaking," and the toxicity of coal ash was one of the issues that the rulemaking would resolve.[234] Alluding to the stigmatizing effect of regulating CCRs under Subtitle C, Representative McKinley then demanded to know what "corporate liability lawyers" would "tell companies about creating wall board for use in homes, hazardous

228. *The Recycling Coal Combustion Residuals Accessibility Act of 2011: Hearings Before the Subcomm. on Env't and the Econ. of the H. Comm. on Energy & Commerce*, 112th Cong., 1st Sess. (2011) (Testimony of Mathy Stanislaus, EPA), at 6.

229. *Id.* at 8.

230. *Id*.

231. *Id.* at 8.

232. *See id.* at 16–18, 44–46, 50–51.

233. *Id.* at 50.

234. *Id.* at 51.

material."[235] Stanislaus tried to explain again—to no avail—that the EPA proposal exempted recycled coal ash used in products like wallboard and that the central issue for the rulemaking was the characteristics of coal ash when mismanaged in a retention pond and not its characteristics when put to beneficial uses.[236]

The House Energy and Commerce Committee reported out the legislation, now titled the Coal Residuals Reuse and Management Act, in mid-July 2011. It divested the EPA of its authority to regulate CCRs and set forth general standards for state regulation of disposal sites. [237] The EPA would retain the authority to seek an injunction to prevent an imminent hazard, but it would lack inspection and enforcement authority over the old dump sites like the surface impoundment that collapsed at Kingston.[238] As the bill came up for a floor vote, the White House issued a statement opposing the measure, but stopped short of threatening a veto.[239] The full House approved the bill by a vote of 267 to 144 on October 14, 2011.[240] According to House speaker John Boehner, the vote demonstrated that Republicans were fulfilling their promise to stop the Obama Administration from issuing regulations that threatened jobs.[241] But two weeks after the House passed the legislation, a bluff at the We Energies' power plant adjacent to Lake Michigan in Oak Creek, Wisconsin gave way and discharged 2,500 cubic yards of soil contaminated with coal ash into Lake Michgan.[242] Perhaps influenced by this episode, Democrats on the Senate Committee on Environment and Public Works did not even schedule a hearing for the House legislation.

House advocates soon discovered another must-pass piece of legislation: the transportation-reauthorization bill. They approved a rider containing the text of the coal-ash bill they had previously

235. *Id*.

236. *Id*.

237. Avery Fellow, *Energy and Commerce Clears Bill to Give States Regulatory Authority Over Coal Ash*, 42 ENV'T REP. CUR. DEV. (BNA) 1577 (July 15, 2011).

238. *Id.*

239. Dean Scott, *House Rules Panel Clears Coal Ash Bill for Floor Action; White House Hints at Veto*, 42 ENV'T REP. CUR. DEV. (BNA) 2301 (Oct. 14, 2011).

240. Dean Scott, *House Clears Bill to Strip EPA Authority over Coal Ash, Give States Primary Role*, 42 ENV'T REP. CUR. DEV. (BNA) 2349 (Oct. 21, 2011).

241. *Id.*

242. Meg Jones & Don Behm, *Bluff Collapse at Power Plant Sends Dirt, Coal Ash into Lake*, MILWAUKE-WISCONSIN JOURNAL SENTIAL ONLINE, Oct. 31, 2011, http://www.jsonline.com/news/milwaukee/authorities-investigate-bluff-collapse-at-we-energies-plant-132929538.html.

passed as a stand-alone measure.[243] Hoping that the Senate would not remove the rider in the conference committee, industry coalition lobbyists visited each of the individual conferees.[244] They also succeeded in persuading eighty-one representatives to sign a letter to the House conferees urging them to insist that the rider be retained in the conference committee's bill.[245] The Utility Solid Waste Activities Group created a website called "Regulate Coal Ash Right" to appeal to citizens to "tell Congress to include bipartisan coal ash provisions in the surface transportation bill."[246] It was all for naught, however, as the Democratic senators on the conference committee refused to go forward with a bill containing the rider.[247]

Meanwhile, after suffering defeats at OIRA and Congress, environmental groups sought refuge in the courts, filing an "agency forcing" lawsuit against the EPA seeking a court order requiring the agency to issue a final coal-ash rule by a prescribed deadline.[248] The largest manufacturer of CCRs for beneficial use filed its own lawsuit and asked that it be consolidated with the environmental groups' suit.[249] Fearing that the EPA would settle the lawsuit on terms favorable to the environmental groups, the chairman of the House Committee on Energy and Commerce and the chairman of its Subcommittee on Environment and the Economy wrote a letter to EPA Administrator Lisa Jackson urging her not to settle the litigation.[250] In late June 2012, two industry groups intervened in the lawsuit so that they would be parties to any settlement negotiations.[251]

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243. Anthony Adragna, *House Approves Coal Ash Amendment Delegating Regulatory Authority to States*, 43 ENV'T REP. CUR. DEV. (BNA) 1014 (Apr. 20, 2012).

244. *Id.*; Anthony Adragna, *Environmental, Industry Groups Prepare for Transportation Bill Fight Over Coal Ash*, 43 ENV'T REP. CUR. DEV. (BNA) 1080 (Apr. 27, 2012).

245. Anthony Adragna, *81 House Members Urge Conferees to Keep Coal Ash Provisions in Transportation Bill*, 43 ENV'T REP. CUR. DEV. (BNA) 1347 (May 25, 2012).

246. *Id*.

247. Anthony Adragna, *Final Transportation Bill Includes Provisions to Streamline Environmental Review Process,* 43 ENV'T REP. CUR. DEV. (BNA) 1694 (June 29, 2012).

248. Anthony Adragna, *Environmental Groups File Lawsuit Against EPA to Force Coal Ash Regulation*, 43 ENV'T REP. CUR. DEV. (BNA) 889 (Apr. 6, 2012).

249. Anthony Adragna, *Manufacturer of Coal Ash Products Files Lawsuit Seeking Deadline on EPA Final Rule*, 43 ENV'T REP. CUR. DEV. (BNA) 1014 (Apr. 20, 2012).

250. Anthony Adragna, *Republicans Urge EPA Not to Settle with Environmental Groups on Coal Ash*, 43 ENV'T REP. CUR. DEV. (BNA) 458 (Feb. 24, 2012).

251. Anthony Adragna, *Electric Utility, Mining Groups Intervene in EPA Lawsuit Over Coal Ash Regulation*, 43 ENV'T REP. CUR. DEV. (BNA) 1684 (June 29, 2012).

Although Congress has not yet enacted legislation cutting off the coal-ash rulemaking, several near misses suggest the battle is likely to be renewed after the 2012 national elections.

## IV. LESSONS AND SOLUTIONS

### *A. Lessons*

#### 1. Disasters with No Response

As we mentioned at the outset, widely publicized, anthropogenic disasters can create a crisis atmosphere capable of opening policy-making "windows," as the political scientist John Kingdon described the delicate point in time when all factors are aligned toward action.[252] Regulatory agencies always have many more issues on their plates than they can possibly address with their limited resources; and they are increasingly intimidated by the gauntlet they must run to push proposals that well-connected industries oppose through centralized White House review. Congress must struggle to overcome its own inertia on regulatory issues; the laws are complex and their reauthorization has always inspired similarly intense resistance from regulated industries.[253] Historically, disasters have cut through these Gordian knots, largely because they provided progressive activists with the grassroots momentum needed to overcome the "collective action" problem identified by economist Mancur Olson.[254]

The costs of complying with regulations are borne directly by the regulated industries, while the benefits of regulatory protections are spread among thousands or millions of individuals, no single one of whom has a strong enough incentive to seek regulatory change aimed at internalizing those costs.[255] But disgust at the sight of the Cuyahoga River on fire, or fear that an American chemical plant could erupt with the lethal effect of the Union Carbide facility in Bhopal, India, historically served to galvanize enough public support for environmental protection laws that the EPA and Congress were

252. *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (2nd ed., 1997).

253. Most of the major health, safety, and environmental statutes have not been reauthorized in at least two decades. The major exceptions are the increasingly rare instances when they were updated in reaction to the kinds of disasters we mention here.

254. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

255. DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 38 (1989).

compelled to respond.[256] Members of Congress moved toward compromise, although the resulting legislation may be too narrow or weak to empower the relevant agency to prevent the next tragedy.

Until recently, a catastrophe of the order of magnitude of the Kingston spill would have pushed an issue to the front of the policymaking agenda. As the national media focused on the causes of the tragedy, advocates for the victims pointed to regulatory failures or the inadequacy of statutes designed to prevent a second catastrophe, generating an opportunity to pressure agencies and members of Congress into a meaningful response.[257] But the Kingston disaster, along with the Deepwater Horizon oil spill and the Upper Big Branch mine tragedy, did not follow this long-standing historical trend. As always, victims demanded action, the media reported on the human misery left in the wake of the three events, and Congress—at least initially—decried industry negligence, goaded regulators, and demanded a response. Yet Congress did not enact legislation and regulators who tried to respond were stymied.

Whether these developments mark a new, diametrically opposed trend or a brief departure from the usual response is impossible to determine with certainty. But we fear that the deep polarization of the nation's public affairs suggests that the human, natural, and economic costs of such fiascos may need to rise sharply higher before dysfunctional executive and legislative branches kick back into gear. In this final section, we explain our prognosis and suggest the conditions that would be necessary to prove us wrong.

We are well aware, of course, that participants in regulated industries and their political allies believe that the reason the White House and Congress fail to act is that a regulatory response is not warranted on the merits. We reject that explanation. Instead, we believe that the sharp imbalance of economic power that gives regulated industries a louder voice than ordinary citizens and public interest groups in both the legislative and regulatory fora lies at the root of these changes. This imbalance reached its tipping point with the Supreme Court's decision in *Citizens United v. Federal Election*

256. *See* Michael Scott, *Cuyahoga River Fire Galvanized Clean Water and the Environment as a Public Issue*, CLEVELAND PLAIN DEALER, Apr. 13, 2009, *available at* http://www.cleveland.com/science/index.ssf/2009/04/cuyahoga_river_fire_galvanized.html; ENVTL. PROT. AGENCY, *What is the Toxics Release Inventory Program?*, http://www.epa.gov/tri/triprogram/whatis.htm (last updated Oct. 9, 2012).

257. MCGARITY, *supra* note 23, at 22–23.

*Commission*,[258] which raised the stakes for political fundraising from business entities to an unprecedented level. This trend toward industry dominance not just of the traditional administrative process, but of political arenas as well, is compounded by the public's loss of trust in government, a phenomenon that makes galvanizing public sentiment for law reform extraordinarily difficult.

2. Industry Dominance of the Process

Empirical studies demonstrate that regulated parties dominate every stage of the rulemaking process, from pre-proposal negotiations with the agency over the content of the rule, to submission of comments on the proposal, to judicial challenges of the final rule. Because public interest groups have lagged far behind their industry counterparts in effort and intensity, the agencies are under tremendous pressure to default to proposals that weaken regulatory requirements.

The Center for Public Integrity discovered that industry groups opposed to climate change legislation hired four lobbyists for every individual member of Congress, for a total of approximately 2,340 such representatives, compared to the 185 fielded by public interest groups.[259] This dominance on Capitol Hill is mirrored by higher rates of industry participation in administrative proceedings. A survey of Washington-based interest groups found that individual businesses participated in over twice the number of rulemakings as other types of organizations.[260] Another study, examining comments filed on eleven proposed regulations at three agencies, found the same business dominance.[261] Corporations, public utilities, and trade associations filed between 66.7% and 100% of the comments concerning EPA and National Highway Traffic Administration rules, and public interest groups did not file *any* comments regarding five of the eight rules included in the study.[262]

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258. 558 U.S. 310 (2010).

259. Marianne Lavelle, *The Climate Change Lobby Explosion: Will Thousands of Lobbyists Imperil Action on Global Warming?*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2009), *available at* http://www.publicintegrity.org/node/4593.

260. Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005).

261. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250, 252 (1998). The three agencies were the EPA, the NHTSA, and the Department of Housing and Urban Development.

262. *Id*.

In the fall of 2011, the Center for Progressive Reform (CPR), an organization that we helped found, released the most ambitious empirical study of White House regulatory review yet conducted, covering 6,194 separate regulatory proposals and final rules considered during the period from October 16, 2001 to June 1, 2011.[263] Over the course of the decade, OIRA officials met 1,080 times with 5,759 participants.[264] Sixty-five percent of attendees represented industry, about five times the number of people who appeared on behalf of public interest groups.[265] The EPA was given attention far disproportionate to its regulatory output: a surprising 442 of the 1,080 meetings involved regulatory matters that originated at the EPA even though the agency accounted for only eleven percent of the matters that OIRA reviewed.[266] Most troubling of all, CPR discovered that OIRA changes eighty-four percent of EPA rules and sixty-five percent of all other rules before releasing them to the public.[267]

Not surprisingly, as the coal-ash rulemaking demonstrates, industry dominance of the process has a discernible impact on rulemaking outcomes. One recent study of EPA rules regulating hazardous air pollutants concluded that changes to the substance of rules in response to public comments favored industry by a five-to-one margin.[268] Professor David Driesen examined twenty-five rules identified by a GAO study as significantly affected by centralized review, concluding that OIRA-recommended changes reduced regulatory protections with respect to twenty-four of the rules, while the one remaining change was neutral.[269]

Industry advocates in many high-stakes rulemakings are now willing to spend millions of dollars to achieve their regulatory goals by lobbying agency staff and members of Congress. They employ non-traditional tactics such as public relations campaigns replete with

263. RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

264. *Id.* at 5.

265. *Id.* at 8.

266. *Id.* at 9.

267. *Id.* at 4.

268. Golden, *supra* note 261, at 245; Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Regulations*, 63 ADMIN. L. REV. 99, 128–30 (2011) (noting a five to one margin).

269. David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 366 (2006).

attack advertising, coordination with think tanks, media pundits, and bloggers.[270] These blood-sport strategies, several of which were on full display during the EPA's coal-ash rulemaking, go a long way toward explaining the failure of Congress and the EPA to put protective laws and regulations into place in the wake of the Kingston disaster.[271]

If we are right that corporate dominance of national policymaking in the health and safety arena is the most important reason for the failure to respond to disasters, why have the American people failed to respond more sharply to what many would regard to be a corrupt state of affairs in the American political economy?

3. Loss of the Public Trust

No one was killed in the Kingston disaster, and only a few homes were destroyed. The damage was limited to a few hundred acres of land and a couple of rivers. Mayhem of this magnitude is available on almost a daily basis as television outlets operating on a 24-7 news cycle search for stories dramatic enough to attract viewers. A constant diet of disasters may have rendered the American public incapable of either empathy with the victims or outrage over the callous disregard for public safety displayed by the corporate actors who caused the harm. This sense of ennui may well have been exacerbated by government's failure to provide adequate protective responses to serious crises so many times in the past decade—Hurricane Katrina, the Deepwater Horizon oil spill, the Upper Big Branch mining explosion—that people no longer trust government to respond when catastrophes provide dramatic examples of the failure of self-regulation, which is the only alternative to government regulation.[272]

In our view, the current distrust of governmental solutions to social problems has at least three sources. First, thirty years of debilitating attacks on government by the conservative media echo-chamber and irresponsible congressional leaders have convinced many Americans that government officials are by nature less competent and more corruptible than their equivalents in the private sector.[273] Dubbed "bureaucracy bashing" by political scientists,[274] this

270. McGarity, *supra* note 32, at 1703–18.

271. *Id.* at 1708–09.

272. *See* Ron Fournier & Sophie Quinton, *In Nothing We Trust*, NAT'L JOURNAL, Apr. 21, 2012, at 17.

273. *See* David A. Farenthold & Juliet Eilperin, *Historic Oil Spill Fails to Produce Gains for U.S. Environmentalists*, WASH. POST, July 12, 2010, at A1.

practice has "when all else fails, kick the dog" overtones because it involves blaming bureaucrats every time something goes wrong that could conceivably fall within the government's authority to accomplish or prevent. This narrative is especially disturbing when it combines the American commitment to individual freedom with the suggestion that government employees are determined to deprive their fellow citizens of their liberty. An extreme example is House Majority Whip Tom DeLay's attempt on the floor of the House to equate EPA officials with the Gestapo.[275] Although this comparison may have lost some of its potency through constant, mindless repetition, its use by a prominent national official should be exceptionally disturbing to those familiar with the ghastly events of the Holocaust.

And we are not alone. The DeLay comment was made in 1995, the same year that Timothy McVeigh bombed the Alfred P. Murrah Federal Building in Oklahoma City. In a moving speech paying homage to the 168 victims of the attack, President Clinton said: "there is nothing patriotic about hating your country or pretending that you can love your country but despise your Government."[276] Although the President was specifically referring to local militias, at least one scholar before us, Professor Thad Hall, has argued that he was drawing a link between bureaucracy bashing in Congress and this stunning act of violence against the civil service.[277]

Second, putting aside the argument that such extreme attitudes are quite dangerous to the body politic, the varying degrees of disdain for government officials among members of the public have produced a serious brain drain among the civil service as well as deep cuts in its ranks. This has in turn further alienated citizens, who no longer identify public service as a noble calling. The National Commission for the Public Service, chaired by the estimable Paul Volcker, former

274. *See*, *e.g.*, Larry Hubbell, *Ronald Reagan as Presidential Symbol Maker: The FederalBureaucrat as Loafer, Incompetent Buffoon, Good Ole Boy, and Tyrant*, 21 AM. REV. PUB. ADMIN. 237, 244 (1991).

275. *See* Bruce Burkhard, *Year in Review: Congress vs. Environment; Environmental Laws Suffer under GOP-Controlled Congress*, CABLE NEWS NETWORK (Dec. 29, 1995), http://www.cnn.com/EARTH/9512/congress_enviro/ (noting that"[t]he EPA, the Gestapo of government, pure and simply has been one of the major clawholds that the government has maintained on the backs of our constituents," said the majority whip, Rep. Tom DeLay, R-Texas).

276. President Bill Clinton, Remarks at the Michigan State University Commencement Ceremony in East Lansing, Michigan 645 (May 5, 1995).

277. Thad E. Hall, *Live Bureaucrats and Dead Public Servants: How People in Government Are Discussed on the Floor of the House*, 62 PUB. ADMIN. REV. 242, 248 (2002).

chair of the Federal Reserve Board, addressed this reality in 2003 without mincing any words:

> Trust in government—strong after World War II, with the United States assuming international leadership and meeting domestic challenges—has eroded. Government's responsiveness, its efficiency, and too often its honesty are broadly challenged as we enter a new century. The bonds between our citizens and our public servants, essential to democratic government, are frayed even as the responsibilities of government at home and abroad have increased. Government work ought to be a respected source of pride. All too frequently it is not. . . . The notion of public service, once a noble calling proudly pursued by the most talented Americans of every generation, draws an indifferent response from today's young people and repels many of the country's leading private citizens.[278]

Finally, thirty years of budget cuts and debilitating ideological attacks on regulatory agencies have rendered them incapable of delivering the protections that we rightly expect.[279] The EPA, which started out on such a positive and energetic note after Kingston, was ultimately beaten into submission, at least for the foreseeable future.

People are not wrong, of course, when they express disillusionment with the government's performance, especially during a crisis. But disappointment does not have to lead to distrust. Long-standing Washington Post columnist and reporter, Jim Hoagland, once wrote:

> Americans distrust government's powers and motives. They immediately get the joke that has a federal inspector or a state administrator fatuously saying, "We're from the government and here to help." Such suspicion is a healthy instinct—but one that is being carried to destructive and demagogic lengths.[280]

If any country in the world is equipped to maintain both a healthy suspicion of and a sense of humor about government, all without succumbing to ideologues who are trying to destroy its capacity to protect those who need the help, it is this one, however far the ship of state has rolled to the intemperate starboard in recent years.

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278. PAUL A. VOLCKER, BROOKINGS INST., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY iii, 1 (2003), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2003/01governance/01governance.pdf.

279. Eric Liu & Nick Hanauer, *The More What, Less How Government*, DEMOCRACY J. 25–26 (Winter 2011), *available at* http://www.democracyjournal.org/pdf/19/LIU-HANAUER.pdf

280. Jim Hoagland, *Dissing Government*, WASH. POST, Nov. 30, 2003, at B7.

## *B. Solutions*

### 1. Restoring Public Trust

The foregoing explanations for the failure of either Congress or the EPA to provide an effective response to the Kingston catastrophe may leave the reader wondering what *can* stimulate protective governmental action if crises generated by dramatic disasters are no longer capable of doing so. If our society cannot learn from the mistakes that become apparent in the most extreme catastrophes, how can it possibly avoid their future recurrence? And if government has become so ineffective that it can no longer require risk-fraught industries to prevent these events, to what institutions can the potential victims of the next disaster turn?

To a large degree, we share this feeling of helplessness, but we take some comfort in the fact that identifying the cause of a disease is the first step toward deriving a cure. In this part of the Article we do not pretend to have a cure, and the suggestions that we offer here may seem quixotic to some. But we offer them as a first step on the way back to a political economy in which anthropogenic disasters are less frequent and government reacts to the disasters that do occur by putting into place regulatory programs designed to prevent similar disasters in the future.

We believe that very little progress toward effective governmental responses to environmental disasters is likely if we do not first restore public trust in the ability of government to address social problems. And the first step toward restoring public trust is to rebuild the governmental institutions that have the responsibility to protect people from environmental disasters. At the same time, supporters of proactive governmental intervention must displace the business community's well-honed, anti-government narrative with a compelling counter-narrative capable of restoring public trust in government.[281]

### 2. Rebuilding Government

Regulatory agencies like the EPA have little chance of regaining either their self-respect or the power to control corporate misconduct unless the White House and Congress remove themselves from the arena where regulatory decisions, guided by decades of carefully

281. JEROME ARMSTRONG & MARKOS MOULITSAS, CRASHING THE GATE 38, 51 (2006); DAVID M. RICCI, THE TRANSFORMATION OF AMERICAN POLITICS 234 (1993).

crafted law, were meant to be made. Doors must shut all over Washington, D.C. The simple act, in all its iterations, of appealing to the administrator of OIRA or the chair of an agency's congressional appropriations subcommittee must become an outlier that has an appropriate smell of corruption each time a well-heeled corporate lobbyist attempts to travel that route.[282] Or, to put it another way, the blood-sport approach to influencing regulatory decisions must come to an end.

We have two tough audiences to convince that these new tools, so treasured by the people that use them, will bring all of us to a bad end: (1) the thousands of tacticians who earn good livings deploying their blood-sport strategies and the senior corporate executives who sponsor their activities and (2) the political advisers to the president.

Our message has three parts. First, in regulatory wars of attrition, with constantly increasing sums of money needed to derail rulemaking initiatives, the first victims may be the hapless millions of people who live near coal-ash dumps or who have Chinese drywall in their homes. Sooner or later, though, industries will end up squaring off against other industries, and the cost of the battles will spiral out of control. In a recent article outlining blood-sport strategies, Professor McGarity describes an extremely expensive and chaotic fight between bankers and retailers over debit card fees that punished both sides and left neither the clear victor.[283]

One mainstay in the business community's argument against regulation is that, to compete effectively in a global marketplace, companies need a degree of certainty that constantly changing rules do not provide. Yet the business community is far more dependent on the stability that a mature regulatory program can provide than its representatives generally care to admit. Even in the era of shrunken government envisioned by Fredrich von Hayek, Milton Friedman, and Grover Norquist, governmental regulation will persist to make and enforce the rules that make markets possible by providing a level competitive playing field and by giving consumers confidence that they and their families will not be cheated or injured by irresponsible

282. *See generally* Archive of Articles on the Keating Five, http://topics.nytimes.com/topics/reference/timestopics/subjects/k/keating_five/index.html (last visited Nov. 27, 2012). Our frame of reference here is the backlash against the Keating Five, a group of Senators who tried to deflect a Federal Home Loan Bank Board investigation of a company owned by a political contributor. Interference in the regulatory process by Congress should be no less troubling.

283. McGarity, *supra* note 32, at 1703–18.

companies.[284] The question the business community now faces is whether it is better off rolling the dice in increasingly expensive political gambles over the content of the regulations that must inevitably govern the global marketplace or returning to a regulatory system in which expert judgment plays a prominent role and long-standing statutory policies are afforded due respect.

Second, politicians who are inclined to regard shrinking government as the solution to every social problem must be prepared to accept the responsibility for future disasters when the consequences fall on their own constituents. As Congress continues to reduce the resources available to regulatory agencies and as individual members of Congress continue to intervene in the blood-sport battles that rage over individual rulemaking initiatives, it will become increasingly implausible to blame the bureaucrats in charge of hamstrung programs for future catastrophes. Additionally, advocates for consumers and the environment will be able to point a finger with increasing plausibility at the politicians who accepted large campaign contributions at the same time that they were divesting regulatory agencies of their protective powers. If they would like to avoid savage attacks from the victims of the next tragedy brought on by a failure of the regulatory system, these politicians may be well-advised to rein in their own overly aggressive attacks on regulatory agencies during the battles over regulation.

Finally, the president must return the core responsibility for managing regulatory initiatives to the political appointees he selects to lead the agencies. Treating highly competent professionals like Lisa Jackson as little more than symbolic payoffs to key political constituencies, while divesting them of effective control over the most important initiatives on their agencies' agendas, is a strategy that is doomed to failure over the long haul. Not only will an administration that adopts this strategy take a justified beating in the media when the next disaster happens, it will find it far more difficult to persuade qualified people to serve in important administration jobs in the future.

Unfortunately, the presidential inclination to locate all momentous decisions within the White House walls has increased

284. Robert Dreyfuss, *Grover Norquist: 'Field Marshal' of the Bush Tax Plan*, THE NATION (May 14, 2001), http://www.thenation.com/article/grover-norquist-field-marshal-bush-plan#.

dramatically during the last two decades. Presidents understandably worry about loyalty of the civil service, and they are instinctively reluctant to trust senior career officials, many of whom have developed their own power bases within agencies and on Capitol Hill. Quashing ongoing initiatives by the civil service is, unfortunately, far easier for a new White House to accomplish than inspiring bureaucrats to act aggressively in the public interest. Presidents have dramatically expanded the number of handpicked and loyal staffers who work within the ambit of the White House, organizing them into various "councils" with broad and shifting portfolios. The consequences of centralized review are that career employees must report up a long chain of authority before taking significant action and that regulated industries have multiple opportunities for political appeals to reverse decisions they lost at the agency level.

As one of the oldest and most entrenched institutions of centralized review, OIRA poses a formidable bottleneck for protective regulation in both Republican and Democratic administrations. Its staff is composed mostly of economists with training in the details of cost-benefit analysis but scant experience with the other disciplines, such as science and engineering, needed to inform regulatory policy making.[285] At the same time, the agencies have developed their own sophisticated capacity to analyze the costs and benefits of rules and are perfectly capable of advising the political appointee who leads the relevant agency of broader policy implications of particular rulemaking initiatives.

Centralized review hides policymaking behind closed doors, wastes limited government resources, complicates agency priority-setting, demoralizes civil servants, and costs the nation dearly in lost lives, avoidable illness and injury, and destruction of irreplaceable natural resources. President Obama's preoccupation with centralized review has undermined an important symbolic and programmatic goal of his potentially transformative presidency because it has obscured the urgency of reinvigorating health, safety, and environmental agencies. Left uncorrected, this mistake may define his historical legacy in the same negative way that a similar preoccupation with control has already defined the legacy of his predecessor, George W. Bush.

285. Steinzor, *supra* note 23, at 283.

3. Changing the Narrative

Business groups have gained a great deal of political traction with a powerful narrative based on economic freedom. They claim that economic freedom is a necessary precondition to political and individual freedom, and they easily adapt the concept to corporate entities as well as individuals.[286] Freedom is a widely shared human value, but so is security. Most Americans understand that economic freedom allows corporations to develop innovative products, to match those products to consumer desires, and to provide useful services to consumers at the lowest cost. But they also know that corporations can use that freedom irresponsibly to defraud their customers and harm their neighbors. Since corporations cannot be motivated by concerns for others unless those others contribute to their bottom lines, government must provide for the economic and physical security of its citizens. Proponents of protective governmental regulation have an opportunity to enlarge this concept to include the shared value of *economic and physical security* that should be at least as compelling as the business community's focus on its own freedom, especially in an era when corporations are making record profits but not creating jobs at nearly the same pace.[287]

During the Public Interest Era of the late 1960s and early 1970s, consumer and environmental advocates invoked a narrative that focused on *corporate responsibility* for the harms caused by dangerous products and activities. During the past thirty years, the business community has successfully redirected the corporate responsibility narrative into a story about how companies can voluntarily adopt more responsible approaches out of concern for corporate image and the health of the economy. In the wake of the recent confluence of crises, however, this perversion of the corporate responsibility narrative has lost its vitality, and public interest advocates have an opportunity to reinvigorate it in support of stronger governmental protections.[288]

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286. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 4 (1962); *see also* FRIEDRICH VON HAYEK, THE ROAD TO SERFDOM (1976); DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY 15 (2007); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE RIGHT NATION 13 (2004).

287. Michael Powell, *Corporate Profits Are Booming, Why Aren't the Jobs?,* N.Y. TIMES, (Jan. 8, 2011); Floyd Norris, *As Corporate Profits Rise, Workers' Income Declines*, N.Y. TIMES, (Aug. 5, 2011).

288. Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1506 (2007).

When the investigations that invariably follow a disaster conclude that a company's irresponsible conduct played a role in causing the disaster, both the victims and the general public typically demand that the company be held accountable for its wrongdoing. A regulatory agency with an aggressive and well-financed enforcement division is one institution that can hold corporations and their officers and employees accountable for their misdeeds. Thus, *corporate accountability* could provide the foundation for a third branch of the narrative about the role of government in society.

Finally, disasters demonstrate in a dramatic way the *social costs* of irresponsible corporate activities. In the absence of a perfectly functioning tort system, regulatory agencies are in the best position to minimize the social costs of company-caused disasters that society ultimately bears through increased insurance premiums and taxes invested in Medicare and Medicaid. Thus, a social-costs narrative should resonate fairly robustly in a declining economy characterized by large budget deficits and few new taxes.

These four narratives, and perhaps others, offer an alternative to the economic freedom narrative that has dominated the political economy for the last three decades. If carefully nourished and deftly deployed during disasters, these narratives can contribute to the daunting task of rebuilding trust in government in general and regulatory agencies in particular.

## V. CONCLUSION

The failure of Congress and the Obama Administration to react to the Kingston disaster with either protective legislation or regulation may be part of a larger phenomenon that does not bode well for the resuscitation of the health, safety, and environmental regulatory system in this country. Congress did not enact legislation in response to the April 2010 Deepwater Horizon disaster, and the regulatory response consisted largely of reorganizing and renaming the pitifully ineffectual agency that had regulated deepwater drilling in the past.[289] The same failure to respond accompanied the Upper Big Branch explosion of April 2010 and the massive Kingston Tennessee spill of December 2008. If public trust in government remains at its current low level and the institutions responsible for protecting citizens from environmental disasters remain in their current dysfunctional state, we can expect more dramatic disasters in

289. *See* MCGARITY, *supra* note 23.

the future. If, however, supporters of good government and sound environmental protection can create a new narrative to counter an increasingly implausible anti-government creed, and if Congress can be persuaded to provide adequate resources to agencies like the EPA, we may find ourselves on the road toward a government that protects us from domestic disasters as well as it protects us against foreign attack.